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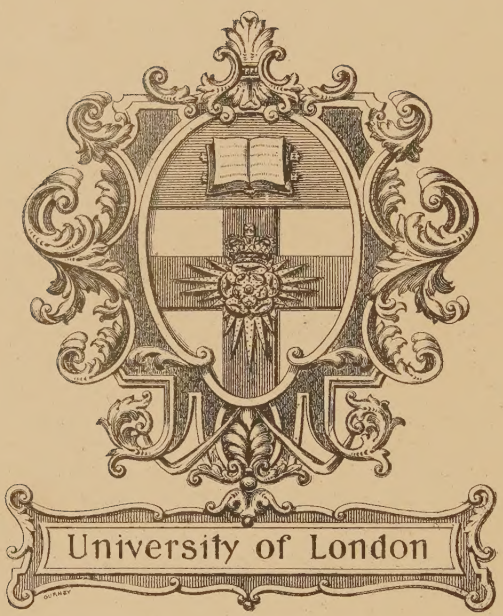

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1944

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE,

AND ADMIRALTY DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS, LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET, LONDON, E.C.4.

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OF

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1944.

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OF

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1944, is as follows:—

In the First Series,
[1944] Ch.

In the Second Series,
[1944] K. B. [1944] P.

In the Third Series,
[1944] A. C.

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ERRATUM

Page 35, line 12: For "The Divisional Court made their order . . . .", read: "The Divisional Court ought to have made their order . . . .".

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AND BY THE

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IN THE ESTATE OF ANDERSON (Deceased).

1943. *Oct.* 21, 22

Will—Soldier's will—"Actual military service"—Home Guard Accidentally shot while training recruits—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11.

The testator was at the date on which he gave to his solicitor instructions to prepare for him a fresh will musketry instructor of a platoon of the Home Guard of which he was a member. About a week after those instructions had been given, the testator was accidentally shot while he was training recruits belonging to the platoon. The solicitor noted at the time the instructions given to him by the testator, and it was contended by the defendant that they formed the subject of a testamentary disposition which satisfied the requirements of s. 11 of the Wills Act, 1837, since, when the instructions were given, the testator was a "soldier "being in actual military service." At that time the testator was not, under Home Guard Regulations, "on duty," or under orders to "muster," or to "stand to," but the defendant contended that the testator was under a continuous obligation to serve which was the same as continuous service :—

Held, that on the date on which the testator gave the instructions to his solicitor he was not a "soldier being in actual military "service" within the statute, and that the wishes expressed in those instructions could not be admitted to probate.

1943

IN THE ESTATE OF ANDERSON (Decd.).

DEFENDED CAUSE.

The plaintiff propounded a will of which he was sole executor dated May 29, 1940, and the first defendant propounded a "soldier's will" made on or about July 25, 1941. On that date the testator, who was a member of the Home Guard, visited his solicitor and gave him instructions for the preparation of a fresh will. The solicitor's note made contemporaneously was as follows: "Attending you on your "instructing us to prepare a fresh will for you under which "you wished Miss Anderson to have a life interest in your "house 'Brentor' and the contents, and the residue of your "estate to pass to your son. Also, on your stating that you "wished our Mr. Cobby to be co-executor with your son, and "on your stating that you would call to sign the new will "next time you were in Worthing and would phone us and "let us know when to expect you." On August 1, 1941, the testator, while acting as musketry instructor in the training of recruits for the platoon of the Home Guard of which he was a member, was accidentally shot. This Home Guard platoon was recruited under the Home Guard regulations and was responsible for the defence of an area which did not include the town of Worthing in which the office of his solicitor was situated. This platoon had not been ordered to "stand to" since about November, 1940. The first defendant contended that when the testator gave his instructions to his solicitor he was, within the meaning of s. 11 of the Wills Act, 1837, a "soldier being in actual military service . . . ."

Beyfus K.C. and *R. T. Barnard* for the plaintiff.

F. C. Denny for the first defendant.

Tyndale K.C. and *T. J. L. Stirling Boyd* for the second defendant, a proposed executor of the fresh will.

LORD MERRIMAN P. It seems to me to be established—and, indeed, the proposition is not disputed on either side—that, assuming that the conditions of s. 11 of the Wills Act, 1837, are complied with, it is immaterial whether the testator knew that what he was doing, at the moment when he gave his instructions, might of itself operate as a testamentary disposition, and—again this proposition is not disputed—

provided his wishes were definitely determined and expressed, the mere fact that he intended, as he obviously did, that they should subsequently be embodied in some more formal document, namely, the usual form of a will duly executed, is also immaterial. On the other hand, it is said that, if the intended dispositions, or suggested dispositions, were still indeterminate pending further discussion, they could not be said to have a testamentary character. I have no doubt that, given the essential condition, these instructions could operate as a soldier's will. Mr. Anderson told the solicitor that he wished Miss Anderson to have a life interest in his house and contents, that the residue of his estate should pass to his son, and that the solicitor should be co-executor with his son. To my mind, there is nothing indefinite or indeterminate about that.

The real difficulty is on the question whether Mr. Anderson was a soldier "in actual military service." I have referred solely to the provisions of the Wills Act, 1837. It seems to me to be unnecessary, having regard to the well-known line of authorities, to go back to the Statute of Frauds or forward to the extension of s. 11 of the Wills Act, 1837, by the Wills (Soldiers and Sailors) Act, 1918. This latter Act, it is true, has extended to sailors, though not at sea, the identical conditions applying to a soldier. It has also enacted other extensions of what has always been called, rightly or wrongly, the "privilege" of the soldier, but those extensions are irrelevant for my present purpose, save only that they justify Mr. Denny in saying that they show a disposition on the part of the legislature rather to extend than to restrict the privilege.

Before dealing with the particular facts of this case, one or two general observations should be made. There would seem to be no doubt about the proposition that the status of the testator must be determined as at the time of the making of the alleged will and not at the time of his death. For example, the death may occur after the military service has ended. If, however, the death occurs in what may be called service conditions, those circumstances may be relevant in considering the nature of the service. That is not because the status has to be determined as at the time of the death, but because the circumstances of the death may throw some light upon the nature of the service. The next general observation which I wish to make, because it will absolve me from going through some of the older text books and authorities, is that reference has often been made to the fact that a soldier is inops consilii.

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IN THE ESTATE OF ANDERSON (Decd.).

Lord Morrison P.

I am, however, satisfied that the mere fact that he is or is not, as the case may be, inops consilii at the time of the making of the will is not of itself decisive, though, undoubtedly, as a matter of history, it may be one of the reasons or foundations for the privilege. A solicitor or a member of the Bar may be unquestionably serving on an expedition, but he can hardly be said to be inops consilii nor would those persons immediately surrounding him, whereas, on the other hand, a member of some isolated unit serving in the north of Scotland, where there was no possibility of consulting an English lawyer, would be more truly said to be inops consilii. Furthermore, the question whether or no the testator is a soldier, or, being a soldier, is "in actual military service," must be determined in relation to the individual and not in relation to all members of the armed forces of the Crown or even in relation to all members of the armed forces of the Crown serving in the United Kingdom. That proposition seems to follow clearly from the decisions of Hill J. in *In the Estate of Grey* (1) and of Pilcher J. in *In the Estate of Rippon* (2). I am in complete agreement with the expressed views of both those learned judges to this effect.

By Army Order No. 94 of 1940 it was notified for information that troops in commands at home and abroad were on active service within the meaning of s. 189, sub.-s. 1, of the Army Act with effect from September 3, 1939. That sub-section of the Army Act provides: "In this Act, if not inconsistent "with the context, the expression 'on active service' as "applied to a person subject to military law means whenever "he is attached to or forms part of a force which is engaged "in operations against the enemy or is engaged in military "operations in a country or place wholly or partly occupied "by an enemy, or is in military occupation of any foreign "country." That sub-section makes the Army Order applicable to soldiers in this country because they are attached to or form part of a force which is engaged in operations against the enemy. It may be that it is difficult to distinguish in any essential respect between a member of a force which is engaged in operations against the enemy and one who is "in actual military service." The point, I think, however, is that, while the Army Order may or may not be decisive on the point whether a force generally is on active service or "in actual military service," as the case may be, *In the Estate*

(1) [1922] P. 140. (2) [1943] P. 61.

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IN THE ESTATE OF ANDERSON (Decd.).

Lord Merriman P.

of Grey (1) and *In the Estate of Rippon* (2), nevertheless seem to me still to leave it open whether at any given moment and in any given circumstances an individual member of the force may or may not be himself engaged in operations against the enemy. I agree with Hill J. that that matter must be decided by the court and is not determined one way or the other by any declaration of military or other authority.

I do not propose to make any general review of the line of authorities. Suffice it to say that it has been accepted for the purposes of this case that " in actual military service " is the equivalent of being " on expedition." I am not bound, I think, to express any opinion whether, in its application to service in this country, Hodson J. in *In the Estate of J. King Spark* (3) went too far in saying that mere service in a camp which was liable to be bombed was, in the circumstances of the present war, decisive that the soldier concerned was " in " actual military service " or whether, on the other hand, Henn Collins J. in *In the Estate of Gibson* (4), went too far the other way in saying that a man who was a member of the armed forces, but whose occupation in the armed forces could fairly be described as a civilian employment, could not be " in actual " military service " because, among other reasons, in that case he would have to include every member of the Home Guard. *Drummond* v. *Parish* (5), which has always been accepted as a leading case, recognizes that, although the soldier lying safely in the castle merely in readiness to repel the invader is not on expedition, he may become so, and it seems to me to be impliedly, if not expressly, recognized in that decision that his service in repelling the invader or the rebel need not necessarily be overseas.

Mr. Denny is right, of course, in directing attention to the fact that the 19th century decisions after the passing of the Wills Act, 1837, were all in relation to campaigns which in fact were overseas, and Mr. Beyfus has expressly admitted that he is not prepared to dispute that a soldier, including a member of the Home Guard, may, in the circumstances of the present war, be " in actual military service " in this country although he very strongly resists the suggestion that this particular member of the Home Guard was at the time of making this alleged will " in actual military service."

(3) [1922] P. 140.
(2) [1943] P. 61.
(3) [1941] P. 115.
(4) [1941] P. 118*n*; [1941] 2 All E. R. 91.
(5) (1843) 3 Curt. 522.

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IN THE ESTATE OF ANDERSON (Decd.).

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Mr. Denny, on the other hand, argued that there was a continuous obligation to serve, and that this continuous obligation resting on the testator was the same as continuous service.

To bring the matter to a point on the actual facts relating to the testator at the relevant time, I have been referred to the official documents relating to service in the Home Guard. By para. 2 (1.) of the Defence (Home Guard) Regulations, 1940 (St. R. & O., 1940, No. 748, as amended by St. R. & O., 1940, Nos. 1613 and 2003, and St. R. & O. 1942, Nos. 91 and 962), "There shall be established a force to be called the "Home Guard consisting of such male persons as may, in "accordance with instructions issued by the Army Council, "voluntarily undertake to serve therein without pay; and "be accepted for such service or as may, in accordance with "such instructions as aforesaid, be enrolled for service therein "without pay after being directed to enrol therein under "reg. 3 of these regulations." There is no question that the testator came within that sub-paragraph. Paragraph 2 (2.) provides: "The period for which persons may be enrolled "to serve in the Home Guard and the conditions of their "service therein shall be such as may be prescribed by "instructions issued by the Army Council, and such instructions "shall make provision for matters relating to the Home Guard, "and in particular for their organization, government, training, "and duties, and for regulating the position as to the determina- "tion of the service of members of the Home Guard (whenever "enrolled and whatever the conditions of their enrolment), "but"—these words are important—"shall not require "members of the Home Guard:—(*a*) To give whole-time "service; or (*b*) To live away from their homes; or (*c*) To "enrol for a period exceeding the period of the present "emergency. Provided that such instructions may require "members of the Home Guard to serve continuously during "any period, or any part of a period, during which the platoon "or other part of the Home Guard to which they belong is "mustered for the purpose of resisting an actual or apprehended "invasion, and while so serving to live away from their "homes." I call attention to one significant point. It is plainly contemplated in these regulations that one single platoon may be mustered while the whole of the rest of the Home Guard is still governed by the ordinary conditions, or, to take the other extreme, that the whole Home Guard may be mustered except one or two, or a certain number of, platoons

or companies. The point is that it emphasizes in very practical form the fact that what has to be decided is what were the circumstances applicable to each particular man. The provisions of para 2 (3.) are important and provide that "Members of the Home Guard shall be members of the armed "forces of the Crown and every such member shall, not-"withstanding that he may hold any rank or commission in "any other of His Majesty's forces, be subject to military "law:— . . . . (*b*) In the case of any other member, as a "soldier," and a corresponding amendment is made to s. 176 of the Army Act in order to make "All members of the Home "Guard, other than those serving on a commission in that "force" subject to military law as soldiers.

It is worth noticing in passing that there is another paragraph in these regulations which appears to recognize that some special provision is necessary to deal with absence without leave or desertion in the case of the Home Guard when not mustered, for, instead of relying on the general provisions of the Army Act in that regard, a special provision is made by para. 5 (1.) of these regulations for dealing with absence without reasonable excuse, while at the same time, para. 5 (2.) contains provisions to safeguard the member's amenability to the provisions of the Army Act respecting absence without leave and desertion when the platoon or other part of the Home Guard to which he belongs is mustered for resisting an actual or apprehended invasion. At the same time it must be pointed out, on the other hand, that the general applicability of the Army Act remains, notwithstanding, but that again, I think, tends to show that those provisions in para. 5 (1.) and (2.) emphasize that it is the particular circumstances in which the member of the particular unit is serving and not the general conditions applying to the Home Guard as a whole which really matter.

Regulation 4 of the Regulations for the Home Guard, 1942, shows that the Home Guard, as an organization, is under the Commander-in-Chief Home Forces for operational purposes and for administration purposes is under the Territorial Association in the particular zone. Regulation 6 deals with training and duty, and here it is important to note that, save in those special cases where the Home Guard is mustered, the man's obligation is limited to forty-eight hours in four weeks, and there are the strictest injunctions that in arranging his service for operations or training regard is to be had to the

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IN THE ESTATE OF ANDERSON (Decd.).

Lord Merriman P.

exigencies of his civilian employment which, ex hypothesi, he is carrying on at the same time, and there are also instructions which, even in the case of calling up, make it necessary at a certain stage to consider whether the civilian occupation is of more importance than the Home Guard duty, and so forth. In other words, short of the muster, the division between the Home Guard's ordinary occupation and his Home Guard service is clearly defined and emphasized. Regulation 7 is as follows: "The following definition of duty "is not intended to be a complete statement of all the "circumstances in which a member of the Home Guard may "be 'on duty'; it shows when a member comes on duty in "the most usual kind of case; and in particular that a member "is not 'on duty' when he is neither actually engaged in any "authorized training or other duty of a military nature nor "has arrived at the place where he is so engaged. A member "of the force comes 'on duty' at the time he reports at a "place of assembly (e.g., unit headquarters, a post, a "rendezvous, etc.) for the purpose of carrying out such military "duty as may have been, or may be assigned to him by a "superior officer, or when he begins to perform such a duty "without being required to report to a place of assembly." Then there are corresponding provisions to show when he comes "off duty." It would be unarguable, in my opinion, that the testator was not "on duty," within the meaning of that definition, at the time of his death, but equally it is unarguable, within the terms of that definition that he was on duty at the time of making his alleged will.

Only one other citation need be made. Regulation 9 distinguishes between employment before invasion and employment during invasion, and among the tasks on which a Home Guard may be likely to be employed before invasion is, as stated in reg. 9 (*a*) (iii.): "Assistance to civil defence "authorities, both during normal times in routine duties and "during and after heavy raiding. (All such assistance will be "carried out as an operational duty and members of the "Home Guard will act under their own commander.)" Therefore, the particular unit and the particular member as a member of the unit may be called out in the actual progress of a raid although the Home Guard, as such, has not been mustered, and, in the terms of these instructions, he will then be on an operational duty. The position may fairly be summarized in this way. There are at least three stages or

conditions contemplated by these regulations with reference to any individual member of the Home Guard. The case most favourable to the argument would be the case of the individual who has in fact responded, or is in the process of responding, to an order to muster because of an invasion or apprehended invasion. As I have already said, Mr. Beyfus has admitted that he is not prepared to dispute that such an one would be a soldier "in actual military service." Descending the scale, the next case is that of the man who, like the testator at the time of his death, was on training duties, or the man, covered by the regulation to which I last referred, who was assisting the civil defence authorities as an operational duty in the actual progress of a raid. I regard that category as one involving some difficulty, the determination of which would involve a consideration of, and an attempt to reconcile, or, if not to reconcile, to choose between, the decisions in *In the Estate of J. King Spark* (1) and in *In the Estate of Gibson* (2), but, as those are not the circumstances in which this alleged will was made, I propose to say no more about it. At the other end of the scale is the member of the Home Guard who, not having been called on to live away from his home and not being engaged, in any sense of the word, in any duties, operational, training, or otherwise, but moving maybe about the country, whether inside or outside the area in which his duties would compel him to be if he were on duty, is carrying on purely civilian activities.

In the present case, I am satisfied that it is impossible to say that the testator, visiting his solicitor as a civilian on the date in question, was a soldier "in actual military service," and, for these reasons, I am not able to admit to probate the wishes which, on that occasion, he expressed to his solicitor. That being so, and the will of May 29, 1940, having been formally proved, I pronounce in favour of that will.

Solicitors for plaintiff: *Burton, Yeates & Hart*, for *Charles, Malcolm & Wilson, Worthing.*

Solicitors for first defendant: *Raymond-Barker, Nix & Co.*

Solicitors for second defendant: *C. J. C. Davenport & Son.*

(1) [1941] P. 115. (2) [1941] P. 118n.

T. A. H.

1943

EASTERBROOK *v.* EASTERBROOK (otherwise JERVIS).

Nov. 15.

Nullity of marriage — Jurisdiction — Petitioner domiciled abroad, respondent domiciled in England—Ceremony of marriage in England —Both parties resident in England.

The petitioner in a nullity suit on the ground of wilful refusal to consummate the marriage was domiciled in Canada and the respondent was domiciled in England. The ceremony of marriage took place in England, and thereafter both parties were resident in England :—

Held, that the court had jurisdiction to entertain the petition. *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* [1931] P. 29 not followed.

PETITION by George Henry Easterbrook for nullity of marriage on the ground of the respondents' wilful refusal to consummate the marriage.

The parties went through a ceremony of marriage on February 6, 1941, at the Nottingham register office. After the ceremony, the petitioner, who was a private soldier serving with the Canadian Forces, and the respondent lived and cohabited at different addresses and at an address in Nottingham. The petition, which was undefended, alleged that the petitioner was domiciled in Canada and that the respondent was domiciled in England. There was no protest to the jurisdiction.

W. Latey for the petitioner. The court has jurisdiction to deal with this petition. Where the petitioning husband was domiciled abroad the ecclesiastical courts had jurisdiction if the marriage had taken place in England or if either of the parties was resident in England. Under s. 21 (*a*) of the Supreme Court of Judicature (Consolidation) Act, 1925, the court has the same jurisdiction in nullity suits as was vested in the ecclesiastical courts, and that is so whether the marriage is void or voidable. *Inverclyde* (otherwise *Tripp*) v. *Inverclyde* (1) was the first reported case in which it was held that the petitioning husband's domicile was the exclusive test of jurisdiction in a nullity suit, and the decision in that case rested on an obiter dictum of Lord Phillimore in *Salvesen or von Lorang* v. *Administrator of Austrian Property* (2), the point not being dealt with by any other member of the House. In *White* (*otherwise Bennett*) v. *White* (3) the woman petitioner, who sought a decree of nullity on the ground of the bigamy of

(1) [1931] P. 29.
(2) [1927] A. C. 641.
(3) [1937] P. 111.

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the man, had gone through a form of marriage in a foreign country. The respondent did not appear and made no protest to the jurisdiction. After argument Bucknill J. held that the woman had never acquired the domicile of the man but that the court had jurisdiction.

HODSON J. The petitioner is domiciled in Canada and the respondent is domiciled in England. Both parties at all material times were resident in England, and the ceremony of marriage was celebrated in England. The case is undefended, and I have heard argument only on behalf of the petitioner, who, through his counsel, has drawn my attention to a number of authorities dealing with the question of jurisdiction. I have in particular been referred to *Salvesen or von Lorang* v. *Administrator of Austrian Property* (1); *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (2); and *White* (*otherwise Bennett*) v. *White* (3). As in *White* (*otherwise Bennett*) v. *White* (3), so in this case there has been no appearance and no protest to the jurisdiction, and I am unable, with all respect to Bateson J., to see the distinction for the purpose of jurisdiction which he appears to have drawn in *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (2) between voidable and void marriages. In my judgment, on the facts of this case I have jurisdiction, as there was held to be jurisdiction in *White* (*otherwise Bennett*) v. *White* (3), to pronounce a decree of nullity on the grounds set out in the petition. There will be a decree nisi.

Decree nisi.

Solicitor for the petitioner: *Miss E. E. Spicer.*

T. A. H.

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Dec. 2, 3, 7, 8, 21.

Shipping — Prize — Cargo — Passing of property — Pre-war contract — British ship—Neutral shippers to enemy house—Irrevocable letter of credit—Diversion of ship to British port—Refusal of bank to accept draft—Cancellation of contract—Contraband—Enemy house of trade.

Before, and not in contemplation of, the outbreak of war, the Otaru branch of a Japanese company shipped a quantity of beans

(1) (1927) A. C. 641.
(2) (1933) P. 29.
(3) (1937) P. 111.

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in a British ship consigned to their house at Hamburg, a company with a separate entity incorporated in Germany. After the outbreak of war with Germany the ship was diverted by her owners to Liverpool where the goods were landed, and, in November, 1939, were seized as prize. The contract for the sale of the goods to the German company was contained in bought and sold notes, dated in July, 1939, together with a confirmed and irrevocable letter of credit issued by the Yokohama Specie Bank at Hamburg addressed to the Otaru branch of the Japanese company. It authorized the Otaru branch to draw on the bank's branch in London at three months after sight for the price of the goods for account of the German company. The draft against this credit was negotiated at the Otaru branch of the bank on August 7. The bills of lading were made out to the order of the bank at Hamburg in triplicate. One set, with the other shipping documents, was carried by the ship; one was sent by mail to Hamburg; and the third, with the Otaru branch's draft on London and the negotiating bank's letter, was forwarded to London against acceptance of the draft. On arrival of the draft in London, war then having broken out, the bank refused to accept the draft, the German company notified the Otaru branch that they had cancelled the contract, and the Otaru branch cabled their London branch inquiring as to the possibility of disposing of the goods in London or Rotterdam :—

Held, (i.) that the inference to be drawn from the facts was that the property was not intended to pass until acceptance of the draft, and that the goods were the property of the sellers, then neutrals, at the time of seizure; (ii.) that, after the goods had been landed, a fresh shipment would have had to be arranged to get the goods to Hamburg (which would have been impossible) or Rotterdam, of which there was no evidence; that, accordingly, the goods had ceased to be destined for Germany; and that the claim for condemnation on the ground that at the date of seizure they were contraband, failed; (iii.) that the consignment of the goods to the German company to be dealt with in Germany did not make the transaction the concern of a neutral company's enemy house of trade, and that, on this ground, the goods could not be deemed, contrary to the fact, to be enemy property; and (iv.) that it was not established, therefore, on any ground that the goods were lawful prize at the date of seizure.

ACTION for condemnation of cargo as prize.

The Procurator-General sought the condemnation as enemy property or contraband of a consignment of one hundred tons of nagauzura beans shipped (following the nomenclature in the report of *The Glenroy* (1)) by the Otaru branch of the Mitsui company, a company incorporated in Japan, to the German company, their house at Hamburg, in the British steamship *Glenroy*. The contract of sale was contained in bought and sold

(1) [1943] P. 109.

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notes, dated respectively July 10 and 11, 1939, together with a confirmed and irrevocable letter of credit issued by the Yokohama Specie Bank, Ld., hereinafter referred to as the bank. It was admitted that the contract was made in the ordinary course of business, and not in anticipation of the outbreak of war. No application had been made on behalf of the Mitsui company itself, or of the London branch on behalf of the Mitsui company, for a licence to appear and be heard in support of the claim dated June 12, 1942, by the London branch in so far as this was made on behalf of the Mitsui company. The only claimant was one Spencer, the controller appointed by the Board of Trade to wind up the London branch, in the circumstances already set out in the earlier judgment, claiming on behalf of himself as such controller and of the London branch. At the time of his appearance and claim filed in March, 1943, he was acting only by virtue of his appointment by the Board of Trade to control and supervise the London branch, but it was agreed that he was to be treated as appearing and claiming by virtue of his subsequent appointment, dated April 22, 1943, to control the winding-up of the London branch. By an order dated July 18, 1940, the goods themselves had been released to the London branch that they might be sold. As a condition of this release the bank in London which, being registered under the same provisions of the Companies Acts as applied to the London branch was merely a branch of the parent bank, submitted to the jurisdiction of the court, and, by a bail bond, dated July 23, 1940, consented that, if the London branch, as claimants to the goods, should not pay what might be adjudged against them execution might issue against them for a sum not exceeding 1,300*l.* It was assumed that, whatever rights the Procurator-General had to enforce the bond would be available for the purposes of the present claim. It was conceded by the claimant that, if the property had passed before the outbreak of war to the German company, nothing that had since occurred would avail to defeat the rights of the Crown. The bought note, dated Hamburg, July 10, 1939, and the sold note, dated Otaru, July 11, 1939, were not in identical terms, but no point was taken that the parties were not ad idem and the court was invited to deal with the case on the basis that there was a concluded contract and that a bill was to be drawn in accordance with a letter of credit. The letter of credit was issued by the bank at Hamburg on August 5, 1939,

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and was addressed to the Otaru branch. It was the bank's printed form of a confirmed and irrevocable credit with the additional provision, in type, that drafts drawn thereunder were negotiable through the bank only. This proviso was repeated in type in connexion with the bank's agreement to honour the drafts on presentation at their office in London. It authorized the Otaru branch to draw on the bank in London at three months after sight for account of the German company for any sum not exceeding 1,481*l.* 4*s.* 0*d.* for a one hundred per cent. invoice cost for about one hundred tons of nagauzura beans to be shipped by the Otaru branch from Japan to Hamburg during July, 1939. The bills of lading were made out to order of the bank in triplicate, and with the other shipping documents in triplicate to be dispatched as follows :— One set to be forwarded by the negotiating bank, which had to be a branch of the bank, to the bank at Hamburg by the steamer carrying the goods or by the first available mail ; the second set to be forwarded by the following mail to the bank at Hamburg ; and the third set to be attached to the Otaru branch's drafts on London, together with the negotiating bank's letter certifying that all documents had been made out and disposed of in accordance with the terms of the letter of credit. These documents were to be delivered to the bank in London against acceptance of the draft. It was also provided that all drafts against this credit were to be drawn or negotiated on or before August 15, and were to contain a reference to the letter of credit, and provision was made for sending advice of the draft and endorsing the amount of the draft negotiated. The draft was negotiated at the Otaru branch of the bank on August 7. The letter of credit ended with the following clause :—" And we hereby agree with the drawers' " endorsers and bona fide holders of drafts drawn in accordance " with the terms and conditions of this credit that such drafts " shall be honoured on presentation at our office in London " provided they are negotiated through the Yokohama Specie " Bank, Ld." A provision that arbitration was to be in London showed that the construction of the contract was to be governed by English law.

The *Glenroy* sailed on August 1, 1939. On September 13 the German company notified the Otaru branch that they had cancelled the contract unconditionally as (Germany and Great Britain being then at war) they saw no way of effecting delivery or payment, and requested the Otaru branch to dispose

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of the goods as they thought best. On September 16 the Otaru branch cabled the London branch, stating that the contract was cancelled and directing the London branch to inquire as to the possibility of disposing of the goods in London or Rotterdam, to consult the Glen Line as to the whereabouts of the ship and the alteration of destination and the bank in London, who were stated to hold the documents, as to the disposal of the goods. In fact, the *Glenroy* had been ordered to Liverpool instead of London. She arrived at Liverpool on October 17, the goods were unladen into a dock warehouse, and, on November 2, 1939, they were seized as prize.

J. V. Nesbitt for the Procurator-General. The sellers ceased to have any right of disposal in the goods on August 7, 1939, when the property passed to the German buyers or their bank in Hamburg. The goods were then afloat, the draft had been negotiated, and all the documents had been forwarded. The fact that the bills of lading were made out to the order of the buyer's bank was equivalent to making them out to the buyers : see, as to the passing of property, *Ex parte Banner* (1), *Biddell Bros.* v. *E. Clemens Horst Co.* (2), *The Glenearn (No. 2)* (3), *The Miramichi* (4), *The Gabbiano* (5), Benjamin on Sale, 7th ed., p. 411 and s. 19 of the Sale of Goods Act, 1893. The acceptance of the draft was secured by the confirmed letter of credit, and the sellers were paid by the negotiation of the draft through the Otaru branch of the bank : see, as to letters of credit, *The Lutzow (No. 3)* (6), *The Kronprinsessan Margareta* (7). Alternatively, the goods are condemnable as contraband. They consisted of foodstuffs and were consigned to Hamburg. Their owners did nothing to alter the destination after the outbreak of war. They cannot claim the action of the shipowners in diverting the voyage of the ship as their action. The destination must be changed by the cargo owners to avoid condemnation : *The Imina* (8) ; see also, as regards the intention of the parties in cases of contraband, *The Louisiana* (9). In the further alternative, the goods can be condemned as the trade or concern of the German company even if the property is not in them. The fact that

(1) (1875) 2 Ch. D. 278, 286.
(2) [1911] 1 K. B. 214.
(3) [1942] P. 50.
(4) [1915] P. 71.
(5) [1940] P. 166.
(6) (1915) 1 Br. & Col. P. C. 638.
(7) [1921] 1 A. C. 486, 510.
(8) (1800) 3 C. Rob. 167.
(9) [1918] A. C. 461.

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Mitsui's German house had been turned into an incorporated company cannot put the Japanese company in a better position than it would have been if the German company had remained a branch house of the Japanese company: see *The Anglo-Mexican* (1) and *The Lutzow* (2).

Sir Robert Aske K.C. and *Gething* for the claimant. If the goods are not condemnable the Crown cannot recover against the bail given by Mitsui & Co. of London for whom the claimant appears. The goods were never enemy property. The bank was not bound to accept the draft, and the buyers, who did not take up the documents, would not have been bound to repay the draft if it had been accepted. The property was not intended to pass until the shipping documents reached London and the draft was accepted. Neither the discounting of the draft nor the letter of credit affects the date of the passing of the property: see *The Prinz Adalbert* (3), *Eastwood and Holt* v. *Studer* (4), *Stein, Forbes & Co.* v. *County Tailoring Co.* (5) and *Rayner & Co., Ld.* v. *Hambros Bank, Ld.* (6). This was an ordinary c.i.f. contract, payment against documents. The London branch of the bank would have been trading with the enemy if they had accepted the draft. *The Glenroy* could not proceed to Hamburg, and the voyage was frustrated: *British & Foreign Marine Insurance Co., Ld.* v. *Samuel Sanday & Co.* (7); *The Lisette* (8); *The Trende Sostre* (9); *The Imina* (10); *The Alwina* (11). The contract was impossible of performance; and, accordingly, the parties cancelled it. The Hamburg company was not a branch or in partnership with the Japanese company. It was an entirely separate entity, and cannot be regarded as a "house of trade" of the Japanese company. In *The Lutzow* (12) there was one business entity, and the decision rests on that fact. In *The Anglo-Mexican* (13) there was a partnership. On the question of contraband, it cannot be suggested that, after the outbreak of war and when the goods were in a Liverpool warehouse, they could have been reshipped to Hamburg or Rotterdam.

(1) [1916] P. 112, [1918] A. C. 422.
(2) [1918] A. C. 435.
(3) [1917] A. C. 586.
(4) (1926) 31 Com. Cas. 251, 255.
(5) (1916) 115 L. T. 215.
(6) (1942) 74 Ll. L. Rep. 10.
(7) [1916] 1 A. C. 650.
(8) (1806) 6 C. Rob. 387.
(9) Ibid. 390.
(10) 3 C. Rob. 167.
(11) [1918] A. C. 444.
(11) [1918] A. C. 435.
(12) [1916] P. 112.

The goods must be seized in delicto, and in this case they were not.

Nesbitt in reply. The goods could still have been consigned in a neutral vessel to Hamburg or Rotterdam: see *The Minerva* (1). The cases cited for the claimant were blockade cases in which the blockade had been raised before seizure. Further, the doctrine of continuous voyage had not then been invented.

Cur. adv. vult.

Dec. 21. LORD MERRIMAN P. read a judgment in which he stated the facts and continued: It is important to observe that although the status of the claimant is derived from the fact that Japan became a belligerent in December, 1941, and his claim is made on behalf of a branch of what is now an enemy business, all the other circumstances on which the claim is founded had come into existence long before Japan entered the war. The facts with which I have to deal are, therefore, in marked contrast with those considered by Sir Samuel Evans and the Privy Council in *The Palm Branch* (2).

The Procurator-General seeks condemnation on three alternative grounds. First, he alleges that under the contract of sale the property in the goods had passed to the German company before the outbreak of war and that after the outbreak of war no form of transfer, short of physical re-delivery to the Otaru branch as sellers can avail to defeat the Crown's inchoate right of seizure. Secondly, whether or not the property had passed under the contract of sale to the German company, nevertheless the goods being consigned to Hamburg and being seized in the course of transit to that destination are liable to condemnation as contraband. Thirdly, assuming that the property had not passed to the German company, this company though in law a corporate entity, separate from the Mitsui company, was at all material times wholly controlled by the Mitsui company, and was in substance a German branch of that company and that the goods, therefore, were the trade or concern of the enemy house of a neutral trader.

It is agreed on both sides that there is no absolute rule in the case of c.i.f. contracts determining the moment at which the property passes, but that, as in other cases, the intention

(1) (1801) 3 C. Rob. 229. (2) [1916] P. 230; [1919] A. C. 272.

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of the parties must be inferred from the terms of the particular contract. I should have thought, however, but for the argument which Mr. Nesbitt pressed upon me, that this was a typical case of a c.i.f. contract under which the seller is to part with control of the shipping documents only against acceptance of his drafts, with the additional assurance provided by the letter of credit that the drafts will be accepted, provided the terms of the letter of credit are strictly ocomplied with, as in this case they were. The natural inference from this seems to me to be that upon shipment the goods were appropriated to the contract conditionally upon the acceptance of the drafts and that the seller reserved the right of disposal until the condition was fulfilled. In other words it seems to me to be a plain instance of a contract designed to secure that the shipping documents do not get into the hands of the buyers until acceptance of the drafts in accordance with the letter of credit. If so, by the combined effect of s. 18, r 5, sub-s. 2 and s. 19 of the Sale of Goods Act, 1893, the property does not pass till the documents are handed over against the acceptance.

Mr. Nesbitt's argument, however, may be summarized as follows: One of the commonest indicia of the intention to pass the property on shipment (though it is not conclusive), is that the bills of lading are made to order of the buyers (compare s. 19, sub-s. 2 of the Sale of Goods Act); in this case they were to be made out to order of what he described as the buyers' bank; this, it was argued, was the equivalent of making the bills of lading to the German company, as the bank for this purpose were merely agents for the German company; the seller was paid by the negotiation of the draft through a branch of the bank, the acceptance being secured by the letter of credit. This combination of circumstances indicated a clear intention on the part of the Otaru branch, as sellers, to part with all control of the shipping documents to the bank as agents for, or as the alter ego of, the German company, upon shipment and to rely for payment upon the terms of the letter of credit.

This argument seems to me to contain two essential fallacies. The first is involved in the use of the phrase the buyers' bank in connexion with this transaction. It may be appropriate enough to distinguish between the seller's bank and the buyer's bank, where the seller is free to negotiate the drafts through any bank and to ensure that the shipping documents are not parted with to the buyer or to the buyer's bank, as

the case may be, except against the stipulated form of payment; but the phrase seems to me to be quite inappropriate where, as in this case, the whole transaction is financed through one bank. It is no doubt true that the German company has its account with the bank in Germany; so for all I know may the Otaru branch have its account with the bank in Otaru. I am not concerned with the general banking arrangements of the parties. The point, as I see it, is that in this transaction, financed as it is through a single bank, in addition to the contract of sale between the parties themselves, the bank makes separate contracts with each party. It contracts with the buyer to accept and to pay at maturity the seller's draft, presumably upon satisfactory arrangements to put it in funds for the purpose being made by the buyer. In fact the bill was made payable to the bank in London. It contracts with the seller to discount the draft at one of the branches of the bank and it contracts with, among others, the sellers as drawers, provided the terms of the letter of credit are strictly complied with, to accept the drafts on delivery of the shipping documents and to pay on maturity. In respect of the transaction thus understood the use of the phrase "the buyers' bank" is meaningless, and, in the sense sought to be attached to it, that the bank is simply the alter ego of the buyers, misleading. "The bank" are under an obligation to the buyers to release the shipping documents at Hamburg on acceptance of the drafts in exchange for the shipping documents in London, and are under an obligation to the sellers not to release them before such exchange.

The second fallacy seems to me to be that the sellers are paid by negotiation of the draft with the branch of the bank in Otaru. But this negotiation taken by itself merely creates the position that the bank become holders for value of a bill in respect of which, if nothing more occurs, the sellers would incur to them the liability of drawers. Incidentally the bank are also the payees. It is, of course, true that provided the stipulations of the letter of credit are strictly complied with the bank have also undertaken on presentation of the shipping documents in London to assume the primary obligation as acceptors; but it is on the acceptance of the drafts, not on their negotiation, that the sellers, in my opinion, are obliged to part with control of the shipping documents and it seems to me that the whole transaction is designed to ensure that until the moment of acceptance they shall not come into the hands

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of the buyers. The provision that two sets of documents are to go direct to the bank at Hamburg by successive mails is the ordinary stipulation to ensure that the goods can be obtained by the then owner as soon as it is known in Hamburg that the draft has been accepted in London. But it would clearly be a breach of contract on the part of the bank in Hamburg to part with them earlier.

There remains the question whether it makes any difference that, assuming the transaction takes the normal course, the confirmed and irrevocable letter of credit ensures that the drafts will be accepted. In the ordinary course of business no doubt the drafts in such a case are certain to be accepted. But a bank may fail or, as in this case, may be deterred by change of circumstances, from accepting the draft. I see no ground for holding that the seller was prepared to take these, or similar risks: *The Lutzow* (*No.* 3) (1). In the report of that case it does not clearly appear whether the credit was confirmed and irrevocable. If it was so, the first three sentences at the top of page 640 are inaccurate. In *The Kronprinsessan Margareta* (*No.* 2) (2) it is clear that the credit was confirmed. Moreover among the points upon which reliance was placed as showing that the property in the goods had passed from the German consignors to the neutral buyers was the fact that the bills of lading were issued in the name of the consignees. After emphasizing that the case related to post-war transactions as contrasted with *The Miramichi* (3), and *The Parchim* (4), which decided that in the cases of pre-war transactions the passing of the property according to municipal law was the decisive test, Sir Samuel Evans said, "I do not consider that "the letter of credit was anything more than a guarantee "given that the price of the goods would be paid on "presentation of a bill of lading and invoice at Gothenburg. "This circumstance does not, in my view, determine that the "shippers abandoned the jus disponendi, or intended that the "property in the goods should pass before or immediately "upon shipment to the consignees named in the bills of lading. "The instructions to the bank were express and specific that "the documents should only be given up against payment at "Gothenburg; and this, in fact, was what the claimants said "was done" (2). Again on appeals relating, amongst others, to

(1) 1 Br. & Col. P. C. 638.
(2) (1918) 3 Br. & Col. P. C. 138, 148.
(3) [1915] P. 71.
(4) [1918] A. C. 157.

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other shipments in *The Kronprinsessan Margareta* (1st and 2nd voyage respectively) (1), Lord Sumner, after saying that the retention by the seller of the bills of lading was inconsistent with an intention to pass the property, added : " The special " circumstance of the existence of a confirmed banker's credit " in this case is only indirectly relevant. It no doubt enhances " the likelihood that the bills of lading will eventually be taken " up and the goods be paid for, and so diminishes the " importance to the seller of being still able to say that the " goods are his, but it is not direct evidence of intention ; it " is only a reason why a particular intention is more likely to " have been formed in such a case than in others. The intention " has still to be inferred, principally from what was done and " from the communications made with reference to it, and " these point to an intention not to pass the property till the " drafts were paid, and it is really rather a reason for intending " to get the documents presented and taken up as soon as " possible than for an intention not to retain the ownership " even until that could be effected."

In this case the bank, having, no doubt, realized that there was no possibility of the goods getting beyond this country, refused to accept the draft on its arrival in London. I understand that this in fact occurred before seizure. In my opinion, the proper inference from the facts of this case is that the property was not intended to pass until acceptance of the draft. That being so, *The Miramichi* (2) and *The Parchim* (3) apply. These cases settled that the test for condemnation in the case of shipments made without any anticipation of imminent war is whether the property had or had not passed to the enemy buyers at the date of the seizure. In *The Miramichi* (2) the contract of sale was c.i.f. The neutral sellers had negotiated the bill of exchange drawn by themselves on the German buyers to their bank, who had forwarded it to a bank in the enemy country for tender of the shipping documents against acceptance of the bill of exchange. As in this case, the goods were shipped in a British vessel which was diverted to a British port, where the goods were seized as prize. The enemy buyers refused to take up the documents. Their refusal in fact occurred after seizure. Therefore, if the date of dishonour of the bill is material the present is an a fortiori case. In my opinion, however, the material point is that the

(1) [1921] 1 A. C. 486, 517.
(2) [1915] P. 71.
(3) [1918] A. C. 157, 164.

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property in the goods remained in the sellers until acceptance of the draft and the actual date of dishonour is, therefore, immaterial. The judgment of Roche J. in *Eastward and Holt* v. *Studer* (1) and *The Prinz Adalbert* (2) per Lord Sumner support the conclusion to which I have come. In *The Parchim* (3) the property was held to have passed to the enemy upon shipment but, as appears from Lord Parker's analysis of the transaction, it was precisely because the transaction was not an ordinary c.i.f. contract and had "far more of the "characteristics of a contract f.o.b. Taltal than it has of "a contract c.i.f. European port" that the property was held to have passed on shipment. For these reasons I hold that this ground of condemnation fails.

The second ground of condemnation depends neither on the property in the goods nor on the relations between the shippers and the consignees, but on the allegation that the goods are contraband and were destined for a German port at the time of seizure. There is no doubt about the contraband nature of the goods. Food stuffs are conditional contraband; that is to say they are contraband if it can be shown that they are for the use of the enemy government or its armed forces. It might be sufficient to say that the court could take judicial notice of the totalitarian character of the German government and its practice of taking for its own use, or for disposal in whatever way would best help the war effort any goods imported into Germany: see *S.S. Monte Contes* in the Privy Council on appeal from the Prize Court at Gibraltar (4); but the matter is reduced to certainty by the existence of a series of decrees made on the outbreak of war by the government of the Reich, the terms of which were proved by the late Sir Stephen Gaselee in a prize cause heard earlier in the war and have been verified in this case by an affidavit filed on behalf of the Procurator-General, whereby certain commodities automatically become the property of the government on importation. In one of these decrees beans are specifically mentioned. The only question, therefore, is whether these beans were destined for Germany at the time of seizure. As this is the first occasion on which this question has been the subject of contest during the present war it is necessary to consider what is meant by destination at the material time. That the goods on shipment were destined for

(1) 31 Com. Cas. 251.
(2) [1917] A. C. 586.
(3) [1918] A. C. 157, 164.
(4) [1944] A. C. 6.

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Hamburg is, of course, beyond question, but it is necessary to examine the subsequent history. [His Lordship referred to the cables passing between the parties as regards the cancellation of the contract and the landing of the goods in Liverpool, and continued:] I think, therefore, it must be taken that the Otaru branch had accepted the cancellation of the contract—indeed, this was expressly admitted by Mr. Nesbitt—and had themselves recognized the impossibility of the goods proceeding to Hamburg, though possibly the exchange of cables still leaves open the suggestion that the goods might be forwarded to Rotterdam, a point with which I will deal later. Meanwhile it had, on the outbreak of war become impossible in law, and short of barratrous and treasonable action on the part of the master, impossible in fact, for the *Glenroy* to proceed on her voyage to Hamburg and to deliver the goods in accordance with the bills of lading.

Now, there is no doubt that in the warehouse the goods were still in transit for the purposes of seizure as enemy property, see *The Roumanian* (1). But seizure on the ground that they were contraband depends upon the fact that at the time of seizure they were destined for an enemy port; in other words that they were, in effect, seized in the course of running a blockade. That it is enemy destination in fact and not in intention that matters appears to me to be established by a line of authorities. In *The Imina* (2) a ship with a contraband cargo started on a voyage to a blockaded port, but before reaching it the master, learning of the blockade, altered the voyage to a neutral port, before arrival at which the ship was captured. Sir William Scott said: "I must ask then, was this "property taken under such circumstances as make it subject "to the penalty of contraband? Was it taken in delicto, in "the prosecution of an intention of landing it at a hostile "port? Clearly not—but it is said, that in the understanding "and intention of the owner it was going to a hostile port; and "that the intention on his part was complete from the "moment when the ship sailed on that destination: had it "been taken at any period previous to the actual variation, "there could be no question, but that this intention would "have been sufficient to subject the property to confiscation; "but when the variation had actually taken place, however

(1) [1915] P. 26; [1916] 1 A. C. (2) 3 C. Rob. 167, 169.

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" arising, the fact no longer existed. There is no corpus " delicti existing at the time of capture."

Again in *The Lisette* (1), where the ship was captured after the dessation of the blockade, Sir William Scott said that there would have been a clear case for condemnation but for the material distinction of fact that the vessel was not captured until the blockade had ceased. He added " It is said that the " offence was consummated by the act of sailing ; so it is, in a " certain sense. But the ship was not taken in delicto." In *The Trende Sostre* (2), a contraband cargo destined for the Cape of Good Hope, a Dutch possession at the time of shipment, was seized after that settlement had surrendered to the Crown. Sir William Scott observed, " If the port had continued " Dutch, a person could not, I think, have been at liberty to " carry thither articles of a contraband nature, under an " intention of selling other innocent commodities only, and of " proceeding with the contraband articles to a port of ulterior " destination. But before the ship arrives, a circumstance " takes place which completely discharges the whole guilt. " Because, from the moment when the Cape became a British " possession, the goods lost their nature of contraband. They " were going into the possession of a British settlement . . . ; " and later he said, " It is said that the offence was consummated " by the act of sailing, and so it might be with respect to the " design of the party, and if the seizure had been made whilst " the offence continued, the property would have been subject " to condemnation. But when the character of the goods is " altered, and they are no longer to be considered as " contraband, going to the port of an enemy, it is not enough " to say that they were going under an illegal intention. " There may be the mens rea, not accompanied by the act of " going to an enemy's port. I am of opinion, therefore, that " the same rule does apply to cases of contraband, and upon " the same principle on which it has been applied in those of " blockade." These authorities were followed by Sir Samuel Evans in *The Alwina* (3). The decision was affirmed in the Privy Council, but this point was not dealt with. However, in *The Panariellos* (4) a case decided before Sir Samuel Evans' judgment in *The Alwina* (3) was given, Lord Sumner, delivering the judgment of the Privy Council, referred to the principle

(1) 6 C. Rob. 387, 392.
(2) 6 C. Rob. 390.
(3) [1916] P. 131 ; [1918] A. C. 444.
(4) (1916) 2 Br. & Col. P. C. 47.

with which I am dealing and distinguished it, but without disapproval, from the case of a British or allied subject trading with the enemy with which that appeal was concerned.

Even assuming, contrary, as I think, to the facts disclosed by the cables earlier referred to, that the shippers still intended at the time of seizure to get the goods through to Germany by way of Rotterdam, so that the doctrine of continuous voyage could be invoked, it would have been necessary to arrange a fresh shipment. It is inconceivable that shipment to Hamburg would have been allowed, and I am entitled to take judicial notice of the extreme unlikelihood, to put it at its lowest, of the shipment to Rotterdam of goods originally consigned to Hamburg being permitted by the Ministry of Economic Warfare, which had assumed control of all exportation ; but the point is that there is not the slightest evidence of any attempt on the part of anyone concerned to effect any such shipment. Accordingly, I hold that at the date of seizure these goods had in fact ceased to be destined for Germany and that this ground of condemnation also fails.

This brings me to the third point, the argument on which may be summarized as follows :—The German company, though a separate entity in law, is wholly controlled by the Mitsui company, which holds all the shares, and is in substance merely a branch of the Mitsui company in Germany. It is settled law in the case of a neutral individual or firm having a trading branch in an enemy country that, while the business as a whole is regarded as neutral, this is not so as regards so much of the business as is shown to be the concern of the enemy house of trade, and goods involved in its transactions may be condemned in prize as if they were enemy goods. In such a case the failure after the outbreak of war to close the enemy house of trade justifies the condemnation of the goods even though they were shipped before the war ; the consignment of these goods to the German company to be dealt with in Germany made this transaction the concern of an enemy house of trade and since any profit made by the German company is ultimately for the benefit of the Mitsui company, the mere fact that the consignees and the parent company are separate entities cannot put the neutral trader in a better position than if the trade was carried on by a mere branch or agency of a neutral firm. Reliance was placed on *The Anglo-Mexican* (1) ; *The Lutzow* (2), and Pratt's Story on Prize, pp. 60 and 61.

(1) [1918] A. C. 422. (2) [1918] A. C. 435.

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It is vital at the outset to observe that I am not here concerned with arrangements improvised in anticipation of imminent war; still less with arrangements made after the outbreak of war to lend an air of verisimilitude to an otherwise unconvincing transaction. At one time, indeed, the German business of the Mitsui company was conducted at what was merely a branch office in the sense that it had no legal entity apart from the Mitsui company which was, therefore, represented in Hamburg by its own servants or agents. But that was before 1926. In that year, for reasons of commercial convenience, the Germany company was incorporated, with all the legal consequences which flow from the fact. The subsequent opening of a head office in Berlin does not affect the question. Not the least important of these consequences was the creation of a separate entity recognized by German law, capable of owning property, of employing servants, and above all of entering into contracts for the sale of goods with, among others, the Mitsui company itself. Some independent commercial transactions take place, but appear to be the exception. Thus the question seems to me to be not one of putting this neutral trader, the Mitsui company, in a "better" position than it would have been if it had continued to trade in Germany through a mere branch agency of itself, but of putting it in a different position. It seems to me that there is an essential distinction between employing servants or agents, whether they be partners or mere employees, to buy or sell *for* the parent firm or company, without having any property in the goods dealt with distinct from the property of the parent concern, and establishing a separate corporation to buy *from* or sell *to* the parent concern goods in which such corporation parts with or acquires the property, as the case may be, and in respect of the sale or purchase of which it earns the profits or bears the loss on behalf of its own shareholders, even if such shareholders are nominees of the parent company. In such a case—(but I repeat that I am dealing with an ordinary peace-time organization of business and not with an arrangement designed to defeat the potential right of captors)—there seems to me to be no room for importing the notion of a "house of trade" which is applicable to a single commercial entity part of whose business consists of trade in an enemy country. In such a case it is necessary to consider what part of the neutral business is an enemy trade or concern, and it is appropriate to ascertain

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whether the transaction in question originates with that part of the whole which is located in enemy territory (see *The Jonge Klassina* (1)). It is impossible to take as a criterion either the ownership of the business as a whole, or the transfer of property in the goods dealt with between the two houses, for these always lie in the parent concern. In the present case, once it is admitted that the contracts of sale are bona fide commercial transactions entered into according to their tenor by two separate corporations domiciled in a neutral and an enemy country respectively, inquiry as to the country in which the transaction originated seems to me to be meaningless. It originated when the parties in their respective countries were ad idem in making the contract of sale. For this purpose it must be assumed, in accordance with my finding, that at the material time the property in the goods was still in the Mitsui company. No authority has been produced for applying the " house of trade " doctrine to such a case as this. In *The Anglo-Mexican* (2) it was admitted that the goods in question appertained to the enemy branch. In *The Lutzow* (3) emphasis was laid by the Privy Council on the fact that the enemy branch was not incorporated separately and was in no way a separate firm or entity. In my opinion the property in the goods at the material time is the decisive test, and there is no room for any other: see *The Miramichi* (4) and *The Parchim* (5). But if this argument on behalf of the Crown be right, this neutral corporation could never escape condemnation of any goods involved in a pre-war transaction, however innocent, with its subsidiary company in Germany; if the property has passed because the goods are enemy property; and if the property has not passed because they would be deemed, contrary to the fact, to be enemy property. There seems to me to be no warrant for such a contention either in principle or on authority.

I hold, therefore, that the Crown has not established that these goods at the date of seizure were good and lawful prize and that the claimant succeeds in his claim. No order as to costs.

Solicitor for the Procurator-General: *The Treasury Solicitor.*
Solicitors for the claimant: *Waltons & Co.*

(1) (1804) 5 C. Rob. 297.
(2) [1918] A. C. 422.
(3) [1918] A. C. 435.
(4) [1915] P. 71.
(5) [1918] A. C. 157.

E. C. M. T.

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Shipping—Damage—Damage at berth—Duty of wharfingers—Obstruction on bed of berth—Notice board—Conditions exempting from liability—Sufficiency of notice—Limitation of wharfingers' liability.

While lying at the defendants' berth, a barge owned by the plaintiffs, who were in the position of invitees, was damaged by settling on some weights, the presence of which on the berth would have been discovered by the defendants if reasonable care had been taken by them. The defendants relied on conditions on a notice board exhibited on their wharf facing the river front of the berth as exempting them from liability. The lighterman in charge of the barge did not see the notice board when he came to the wharf, and the lettering of the conditions was faded and difficult to read, although the heading " notice to barge owners and others " could be read with reasonable ease :—

Held, that, on the analogy of the railway ticket cases, the defendants had not taken reasonable steps to bring the conditions on the board to the notice of casual invitees, and that the plaintiffs were not affected with knowledge of the terms either as constituting a modification of the conditions of their invitation or as a warning to frequenters of the premises, and that, accordingly, the plaintiffs were entitled to recover.

ACTION for damage.

The plaintiffs were the owners of the dumb barge *Humorist* ; the defendants were J. & W. Nicholson & Co., Ld., the owners of a wharf and premises in Bow Creek. On March 27, 1943, in pursuance of an arrangement previously made, the *Humorist* proceeded to the defendants' premises to load a cargo of barley at the defendants' Clock Mill berth. The *Humorist* was moored in this berth where it was known to all parties that she would necessarily lie aground for substantial periods at low water. On the morning of March 30 the barge was found to be waterlogged and it was apparent that she had sustained serious under-water damage. The berth was constructed of concrete and was covered with a layer of mud a few inches deep. On April 5 and 6 the plaintiffs' surveyors walked over the berth and discovered two 7-lb. weights and some 2-lb. weights in positions which coincided with the bottom damage to the barge. The weights were similar to those used by the defendants in the ordinary course of their business. In October, 1940, a warehouse belonging to the defendants on the opposite side of the Creek had received a hit by a bomb and a certain amount of debris fell on and in

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the neighbourhood of the Clock Mill berth. In March, 1943, the defendants determined to put the berth into use again, and on March 12, having been told that craft were coming to the berth they gave instructions to make the berth ready. The defendants' witnesses stated that they performed two operations: (*a*) they trod over the berth with linked arms and their feet splayed out with the object of discovering and removing any obstruction; (*b*) they then went over the whole berth with squeegees, thus cleaning off the mud from the whole of the berth.

The defendants further relied on the terms on a notice board, 6 ft. 1 in. by 4 ft. 10 in., exhibited on the wall of their mill facing incoming traffic on the river headed: "Notice to barge owners "and others." By this notice board the defendants gave notice that they did not represent that the berth was safe and that barges coming thereto did so at their own risk. The defendants admitted that after the accident the board had been cleaned up and that the writing was more legible than it had been on the material date. The plaintiffs' lighterman did not observe the notice board until his attention was drawn to it after the accident, and he said that when he did see it he could not read it when standing just underneath it. At a survey of the berth in June, 1943, the defendants' surveyor, standing on the quay, took three minutes to read the notice and made three mistakes in doing so.

Gething for the plaintiffs. The onus is on the defendants to show that they had taken reasonable care to see that the berth was fit for the barge to take the ground: see *The Sound Fisher* (1). They are not protected by the notice which was not effectively brought to the plaintiffs' attention. The writing on the board was faint and difficult to read, and the class of person with whom the contract is made must be taken into account: *Marriott* v. *Yeoward Bros.* (2). Conditions attached to carriage by rail are not quite in the same category, for everyone knows that there are conditions on which passengers and goods are carried: *Thomson* v. *L. M. & S. R. Co.* (3); but even in the case of a railway ticket, where the words "for conditions see back" had been obliterated, the passenger was held not to be bound by them: *Sugar* v. *L. M. & S. R. Co.* (4). A last minute notice exhibited on

(1) (1937) 59 Ll. L. R. 123.
(2) [1909] 2 K. B. 987, 992.
(3) [1930] 1 K. B. 41.
(4) [1941] 1 All E. R. 172.

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a board cannot be given to a bargee arriving at a wharf so as to affect his owners with knowledge of the terms.

Scott Cairns for the defendants. The plaintiffs must show that the berth was bad and that the defendants failed to take reasonable care to see that it was in a fit state. If the weights were on the berth on March 12 the defendants would not contest that the examination was insufficient, but they are nevertheless protected by the terms of the notice. Invitees coming to the wharf had a reasonable opportunity of seeing the notice board, and the conditions could be read more or less accurately from the barge itself. The notice board was a condition of the invitation. The conditions need not actually be brought to the notice of the invitees, provided they are put on inquiry whether the writing on the board has anything to do with the berth. An indication in a railway time table that conditions are attached to the issue of a ticket is sufficient: *Thomson* v. *L. M. & S. R. Co.* (1); and the principle is the same here.

Gething replied.

Cur. adv. vult.

Jan. 13. PILCHER J. read a judgment in which he stated the facts and continued: It being common ground that the damage to the *Humorist* was caused by an obstruction on the defendants' berth which ought not to have been there, the first issue is whether the defendants, who were invitors, had exercised reasonable care to see that their berth was safe. Subject to the point which arises on the question of a certain notice which was exhibited on the defendants' premises, the defendants were in the ordinary position of invitors and subject to the ordinary obligations of invitors, that is to say, they were responsible for the exercise of reasonable care and were under a duty if they did not exercise such care to warn the plaintiffs or their agents that they had failed to do so.

If the operation described as (*b*) had been properly done, the 7-lb. weights, if not the 2-lb. weights, would almost certainly have been discovered and removed. The defendants' first contention was that operation (*a*) by itself constituted a sufficient exercise of care and would necessarily have revealed

(1) [1930] 1 K. B. 41.

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the presence of all the weights if they had been there on March 12. In the alternative, they submitted that they had, in fact, carried out operation (*b*) as well, and that the execution of the two operations in sequence fully discharged their duties as invitors to exercise reasonable care to make the berth safe. The defendants asked me to draw the inference that the weights must have found their way on to the berth between March 12 and March 27 when the *Humorist* arrived there. They also put forward a suggestion that the weights might have been deliberately thrown on to the berth round about March 23 to 25 by certain disaffected workmen whom they had had occasion to dismiss. It was argued on behalf of the plaintiffs that operation (*b*) was never, in fact, performed, and that operation (*a*) did not in all the circumstances constitute an exercise of reasonable care by the defendants. While Mr. Scott Cairns did not formally admit that an omission to carry out operation (*b*) would necessarily constitute a lack of reasonable care, it became apparent as the case progressed that operation (*b*) was in all the circumstances a desirable, if not indeed a necessary, precaution to take in the case of a concrete berth which had not been regularly used for several years.

On this aspect of the case it is sufficient to say that I am not satisfied that operation (*b*) was ever performed, and I do not think that operation (*a*) constituted a sufficient exercise of care by the defendants in the preparation of the berth in question for the reception of craft. I think that, working as they were in water and mud, the men might well have failed to discover the weights which did the damage. It follows that I am not satisfied that the defendants, in fact, exercised reasonable care in the preparation of the berth. Subject to the question of the notice, this finding is sufficient to dispose of the case.

The defendants contend that, even if they failed to exercise due care, they are absolved from liability by reason of the terms of the notice board which, it was submitted, constituted a modification of the terms of the general invitation to the plaintiffs. I am satisfied that in the condition in which it was on March 27, the notice must have been extremely difficult to read, and that from the position in which the *Humorist* lay it would have been difficult for a man with ordinarily good eyesight to decipher it. No doubt, the heading of the notice: "Notice to barge-owners and others" could

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be read with reasonable ease, but I am not satisfied that the body of the notice was readily legible either to a lighterman approaching the wharf or to a lighterman in a lighter moored in the berth. On the analogy of the railway ticket cases, I am not satisfied that the defendants took reasonable steps to bring the conditions on the notice-board to the notice of casual invitees. I do not think that the plaintiffs can in the circumstances be affected with knowledge of the terms of the notice, either as constituting a modification of the conditions of their invitation or as a warning to frequenters of their premises. On this finding it becomes unnecessary for me to express any view as to the effect which the notice in question would have had on the relationship of the parties in this case if the plaintiffs had been affected with knowledge of its terms. The result is that the plaintiffs succeed and are entitled to judgment.

Solicitors for plaintiffs : *Stocken, May, Sykes & Dearman.*
Solicitors for defendants : *J. A. & H. E. Farnfield.*

E. C. M. T.

RIGBY *v.* RIGBY.

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Jan. 31.

Justices—Husband and wife—Maintenance order—Insistence by husband, while suffering from venereal disease, on having sexual intercourse with wife—"Insisted"—Amendment of complaint by Divisional Court—Jurisdiction—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 2 (*b*)—*Matrimonial Causes Rules*, 1937, *r.* 67 (5.), (6.).

A wife made a complaint to a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, alleging that her husband had been guilty of persistent cruelty to her. The only evidence that she gave in support of her complaint of persistent cruelty was that on one occasion her husband, while suffering from a venereal disease and knowing that he was so suffering, insisted on having sexual intercourse with her. On that evidence the justices found that the complaint of persistent cruelty had been proved and made an order in favour of the wife for the custody of her two infant children and for maintenance. On appeal, the Divisional Court held that a charge of persistent cruelty could not be supported by evidence of an isolated act, but that the evidence of the wife would support a complaint based on s. 1, sub-s. 2 (*b*), of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, and they amended the complaint to one under that Act with a finding that the amended complaint had been proved, holding that they were entitled so to amend the proceedings by r. 67 (5.) and (6.) of the Matrimonial Causes Rules, 1937:—

Held, (1.) that the Divisional Court were not entitled by reason of the Matrimonial Causes Rules, 1937, to amend the proceedings and to substitute an entirely new complaint for the complaint upon which the court of summary jurisdiction adjudicated; (2.) that a complaint of persistent cruelty could not be supported by evidence of an isolated act.

Observations upon the meaning of the word "insisted" in s. 1, sub-s. 2 (*b*), of the Act of 1925.

Appeal from a Divisional Court of the Divorce Division.

Doris Madeline Rigby, who was the wife of David Bell Rigby, made a complaint against her husband before the Hawarden petty sessions that on May 27, 1943, and on divers days previous thereto he had been guilty of persistent cruelty to her, and she asked for the legal custody of the two infant children of the marriage and for an order for maintenance.

There was also another complaint by the wife against her husband for wilfully neglecting to maintain her.

The wife gave evidence before the justices that her husband "went to the Liverpool Infirmary. He later attended as an "out-patient for syphilis in May, and we afterwards occupied

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" separate rooms. On May 27 he wanted to have connexion. " I refused and he insisted, and as a result I left the house " and have not returned." In cross-examination, the wife said : " Husband knew he had syphilis . . . . No suggestion of " violence. Only on one occasion since returning from infirmary " did husband attempt connexion."

The justices found that the complaint that the husband had been guilty of persistent cruelty to his wife had been proved, and they made an order giving her the legal custody of the two infant children of the marriage and ordered the husband to pay his wife a weekly sum for the maintenance of herself and the children. No order was made on the summons for wilful neglect to maintain. The husband appealed to a Divisional Court which held that a court of summary jurisdiction could not find a complaint of persistent cruelty proved when there was evidence of only an isolated instance, but the court held that the evidence given by the wife amounted to a statement by her that her husband had been guilty of an offence within s. 1, sub-s. 2 (*b*), of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (1), and that they were entitled, under r. 67, (5.) and (6.), of the Matrimonial Causes Rules, 1937(2), to amend the complaint into one in the terms of s. 1, sub-s. 2 (*b*), of the Act of 1925, with a finding that that amended complaint had been proved. The husband appealed.

Acton Pile for the husband. The Divisional Court had no power under the Matrimonial Causes Rules, 1937, r. 67 (5.) and (6.), to amend the complaint from one of persistent cruelty into one under s. 1, sub-s. 2 (*b*), of the Act of 1925.

(1) Summary Jurisdiction (Separation & Maintenance) Act, 1925, s. 1, sub-s. 2 : " Amongst the " grounds on which a married " woman may apply for an order " or orders under the principal " Act there shall be included the " following grounds . . . . (*b*) that " her husband while suffering " from a venereal disease, and " knowing that he was so suffering, insisted on having sexual " intercourse with her."

(2) Matrimonial Causes Rules, 1937, r. 67 (5.) : " The Divisional " Court shall have power to extend the time for appealing, or " to give leave to amend the " grounds of appeal, or to make " any other order on such terms " as the court shall think just to " ensure the determination on the " merits of the real questions in " controversy between the " parties." (6.) : " The court " shall have power to draw all " inferences of fact which might " have been drawn in the court " below and to give any judgment " and make any order which ought " to have been made . . . ."

To support a complaint of persistent cruelty there ought to be evidence of several acts of cruelty. Evidence of an isolated instance of cruelty will not support such a charge. In the absence of such evidence the Divisional Court ought to have allowed the appeal and dismissed the complaint and not to have amended the complaint into a totally different complaint from that adjudicated on by the court of summary jurisdiction. [He was stopped.]

Arthian Davies for the wife. There were two summonses before the justices, a complaint against the husband for wilful neglect to maintain his wife as well as a complaint for persistent cruelty. The Divisional Court made their order on the complaint for wilful neglect to maintain the wife. It was held in *Foster* v. *Foster* (1) that a successful attempt by a husband, who knows that he is suffering from venereal disease, to have connexion with his wife against her will, may be legal cruelty, although, in fact, the disease is not communicated to the wife. It is clear that the justices in the present case held that the husband did have sexual intercourse with his wife while he was suffering from a venereal disease. It is not suggested that the justices were entitled on the evidence to find that the charge of persistent cruelty had been proved. What had been proved was an offence under s. 1, sub-s. 2 (*b*), of the Act of 1925, and the Divisional Court were entitled to find wilful neglect on the part of the husband to maintain his wife, and that she had just cause for leaving him. Under r. 67 of the Matrimonial Causes Rules, 1937, the Divisional Court had power to make an order which the justices ought to have made.

SCOTT L.J. In this case the court must set aside the order made by the Divisional Court, and also the order made by the court of summary jurisdiction, without prejudice to any other proceedings which the wife may be advised to take. In view of that possibility I will say as little as possible about the facts of the case.

Two complaints were made by the wife against her husband before the court of summary jurisdiction; one for persistent cruelty and the other for wilful neglect to maintain her. On the hearing at the police court it appeared that the cruelty on which the wife relied was an allegation by her that on one

(1) [1921] P. 438.

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occasion her husband, while suffering from syphilis and with the knowledge that he was so suffering, insisted on having sexual intercourse with her. The justices found as a fact on that evidence that the husband had been guilty of persistent cruelty to her and made an order on him for maintenance. In my opinion one act of the kind relied on by the wife could not satisfy the statutory requirements as being persistent cruelty. There must be more than a single isolated act to constitute that offence. That being so, there was no evidence on which the justices could come to the conclusion that the husband had been guilty of persistent cruelty to his wife.

On appeal the Divisional Court held that it was open to them to amend the proceedings and alter the complaint and the order which the justices had made so as to base the order for maintenance made by the justices on a finding that the husband, while knowingly suffering from syphilis, insisted on having sexual intercourse with her so as to bring the case within s. 1, sub-s. 2 (*b*), of the Act of 1925. In my opinion, the Divisional Court had no jurisdiction to make that alteration. The offence charged before the justices against the husband was one of persistent cruelty to his wife, and the finding of the justices was one of persistent cruelty, but the particular act on which the Divisional Court placed reliance was not really investigated by the justices. The statutory offence set out in s. 1, sub-s. 2 (*b*), is expressed in language which calls for careful consideration as to what its scope really is. What is the real meaning of the word "insisted"? In my opinion, it means something short of compelling, but what will constitute insistence is a matter for careful investigation and for evidence. That it is something short of compelling is indicated by para. (*c*) of the same sub-section where the word "compel" is used when dealing with a husband compelling his wife to submit herself to prostitution. The choice of the word "insist" instead of "compel" in para. (*b*) shews that the offence can be something short of compulsion. I will say nothing about the offence here because we are discharging the orders which have been made by the justices and the Divisional Court, and it is open to the wife to take other proceedings if she desires to do so. The justices did not purport to deal with the summons for wilful neglect at all, and it was not considered by the Divisional Court. If that summons has not been disposed of, and it does not appear whether or not it was disposed of, it would be open to the wife to have

it heard. In any event, she would be in a position to take out another summons asking for maintenance on the ground of wilful neglect. That is all I need say for the purpose of this judgment.

GODDARD L.J. I agree. I am going to assume, although there is no direct evidence of it on the justices' notes, that in addition to a summons alleging persistent cruelty under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, the wife also preferred a second summons for wilful neglect to maintain her. The only order made by the justices was on the complaint alleging persistent cruelty. It is plain on the evidence that the wife made only one charge against her husband, so far as cruelty was concerned, and that was the charge specified in s. 1, sub-s. 2 (*b*), of the Act of 1925. That sub-section affords a separate and distinct ground on which a wife can apply for a separation or a maintenance order, but there was no evidence before the justices of any persistent cruelty on the part of the husband towards his wife. If he was guilty of the act alleged against him he was so, on the evidence, on one occasion only, and that would not constitute persistent cruelty. If, however, the wife proved that her husband insisted on having sexual intercourse with her while he was suffering from a venereal disease, and knowing that he was so suffering, she would have been entitled to an order against him if a complaint to that effect had been alleged and the justices had found that the act was proved. As I have already said, the only complaint heard was one of persistent cruelty as to which there was no evidence.

In the Divisional Court the President pointed out that there was no evidence of persistent cruelty and he also pointed out, and I agree with him, that one offence by a husband of the nature of that referred to in s. 1, sub-s. 2 (*b*), of the Act of 1925 would be sufficient to entitle the wife to an order. Thereupon, the Divisional Court, acting as they said under r. 67, (5.) and (6.), of the Matrimonial Causes Rules, 1937, held that they had the power not only to amend the order of the justices, but also to amend the proceedings by altering the complaint. I do not think that the Matrimonial Causes Rules, 1937, gave power to the Divisional Court to alter the proceedings from the outset and substitute a complaint which had never been preferred by the wife. If the Divisional Court had the power suggested to amend the

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proceedings it would be open to them, if a wife had preferred a charge of persistent cruelty against her husband and that charge had broken down, to say that, while they agreed that that charge could not be supported, nevertheless they thought that, if a charge of desertion had been made, she would have had a case, and, therefore, they would alter the nature of the proceedings by finding that a case of desertion has been made out. The court would not be entitled to alter a charge of persistent cruelty to one of desertion after the case had been before the justices. To allow such an alteration would put the husband to a great disadvantage because his advocate, if he had one, would not direct his mind at the hearing before the justices to the charge to which the complaint was subsequently altered.

In the present case I do not propose, because I do not think it is necessary, to indicate what, in my opinion, it is necessary for a person to prove when relying on the words "insisted "on having sexual intercourse." It is clear that an advocate might well think that, as he was in court to meet a charge of persistent cruelty only, if the wife proved only one act of cruelty, that it was not desirable to cross-examine her, because one act was not sufficient to establish the charge made. In a case launched under s. 1, sub-s. 2 (*b*), of the Act of 1925 where the point would be whether the husband while suffering from a venereal disease insisted on having sexual intercourse with his wife, the cross-examination of the wife would be very different. I do not think that the Matrimonial Causes Rules, 1937, under which the Divisional Court purported to act, gave them the power to deal with a case which had never been alleged by the wife or tried by the justices. That is not the kind of amendment which is contemplated by the words "make any order which ought to have been made" in para. 6 of r. 67 of the rules. If the justices, in dealing with a case of persistent cruelty, make an order which ought not to have been made on that charge, the Divisional Court would have power to alter it, but here they substituted a charge which the wife had never alleged for the one on which the justices had adjudicated. The decision of this court must be to reverse the decision of the Divisional Court and to discharge the order made by the justices. If the second summons is still pending the wife can proceed on it, and I also see no reason why she should not be able now to take out a summons returnable at the same time alleging as a ground of complaint

against her husband the matters dealt with by the Summary Jurisdiction Act, 1925, s. 1, sub-s. 2 (*b*).

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DU PARCQ L.J. I agree, and particularly with everything that Goddard L.J. has said in his judgment. At the hearing before the justices the charge of persistent cruelty was gone into and the wife called what evidence she had. She clearly did not prove a case of persistent cruelty, and it involves no hardship on her that she will not have an opportunity of proving persistent cruelty again. On the other hand, it would be a great hardship on the husband if that matter were to be newly litigated. Every other charge is open to the wife. With regard to the possibility of proceedings by her under s. 1, sub-s. 2 (*b*), of the Act of 1925, I think it desirable to say that, however reluctant people may be to go into such matters, it is very important that justices who are dealing with a charge of this character should take the evidence in detail as to exactly what the husband said or did. If this is done, they will usually have no difficulty in deciding whether or not the case falls within the sub-section.

Appeal allowed.

Solicitors for husband: *L. Bingham & Co., for Ouseley-Smith & Co., Chester.*

Solicitors for wife: *Pritchard, Englefield & Co., for G. L. Greene, Chester.*

R. F. S.

In re HOWARD, DECD.

HOWARD *v.* TREASURY SOLICITOR.

1943 *Dec.* 2.

1944 *Feb.* 9.

Probate—Revocation of will—Revocation by will not susceptible to probate—Construction of later will.

Administration—Survivorship—Presumption—Evidence of simultaneous death—Air raid—Testator and legatees killed in same house—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 184.

On May 6, 1940, the deceased, Frank Muncaster Howard, who in 1933 had executed a will leaving his estate to his son, executed two wills, by one of which he left his estate to his wife and by the other of which he left it to his son. There was nothing to indicate the order in which the two wills had been executed, and each of them contained a clause revoking all former wills. On

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September 25, 1940, the testator, his wife and his son were killed when as a result of enemy action the house in which all three were sleeping, the husband and the wife in one room and the son in another room on another floor, was destroyed. Only scattered remnants of the parents' bodies were found, but the son's body was found apart, but not dismembered :—

Held, that the two wills executed on May 6, 1940, were irreconcileable, and, therefore, could not be admitted to probate, but that they were effective to revoke the will of 1933 :—

Held, further, that the death of the testator and his wife were in law simultaneous : *In re Grosvenor* [1944] Ch. 138 followed, but that the son did not die simultaneously with them : *In re Grosvenor* distinguished, with the result that there would be a pronouncement of an intestacy.

PROBATE action.

In 1933 the testator, Frank Muncaster Howard, executed a will by which he left the whole of his estate to his son. On May 6, 1940, he executed two wills, one leaving all his estate to his wife Ada Howard and the other leaving it to his son. Both wills formed part of one transaction, and there was nothing to indicate the order in which they were executed. Each will contained a clause revoking all former wills. On September 25, 1940, the deceased, his wife and his son were killed during an air raid by the explosion of a bomb or a mine which demolished the house in which all three were sleeping, the testator and his wife in one room and the son in another room on another floor. Only scattered remnants of the parents' bodies were found, but the body of the son was found apart, but not dismembered.

The plaintiff, Edwin Stafford Howard, was the brother and a next of kin of the testator, and was sole executor under two wills made by the testator and dated April 12, 1933, and May 6, 1940, of both of which the plaintiff renounced probate on January 17, 1941. The first defendant was the Treasury Solicitor who, on December 9, 1941, had obtained a grant of letters of administration of the testator's estate. The second defendant was Muriel Gladys Duthaler, who, on July 4, 1941, had obtained a grant of letters of administration of the estate of Ada Howard, the deceased wife of the testator.

The plaintiff contended that the testator died intestate and asked that letters of administration be granted to him. The first defendant claimed that the court should pronounce for the will dated April 12, 1933. The second defendant's contention was that the court should pronounce for the will

dated May 6, 1940, in favour of the deceased wife of the testator.

Barnard K.C. and *Ifor B. Lloyd* for the plaintiff.

Sir David Maxwell Fyfe S.-G. and *Victor Russell* for the Treasury Solicitor.

Bush James K.C. and *Leslie Brooks* for the second defendant.

Feb. 9. HENN COLLINS J. read the following judgment. The first question is whether one or other of the wills of 1940, though ineffectual as such, yet operates to revoke the earlier dispositions.

To be an effective revocation, a document need not be susceptible to probate (so much is clear on the authorities), though it must comply in form with s. 20 of the Wills Act, 1837. It is contended on the part of the Crown that the true reason why inconsistent wills cannot be admitted to probate is that they are void for uncertainty, and that, being void, they are of no effect, either as wills or as revocations, but to substitute the word "uncertainty" for "inconsistency" seems to me to carry the matter no further. On the face of the documents it is apparent that the testator did not intend both to operate, but did intend one or other to do so, though one cannot say which. That is why neither can be admitted to probate, but since the testator contemplated that one or other would be operative and both revoked all earlier dispositions one is on safe ground in supposing that he intended that no earlier dispositions should have effect.

In my judgment, the wills of 1940, while not admissible to probate, are yet effective to revoke all earlier wills, and I am fortified in this opinion by *In the Goods of Hodgkinson* (1), where the testator made a later will which contained no revocation clause, but was, as to part of his property, inconsistent with a former will. He subsequently revoked the later will by cutting his signature from it animo revocandi. It was held that the later will, though cancelled, revoked the earlier so far as the two were inconsistent. If the testator's intention, deduced from the wills, has any significance, that was a much stronger case than the present, for one might fairly suppose that in revoking the later will the testator intended the earlier to stand wholly and alone. At that point, however, the statute stepped in and prevented a revival of the earlier will. The result, therefore, is an intestacy.

(1) [1893] P. 339.

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I am the less reluctant to come to this conclusion because I know that the alternative contingencies against which the testator thought he was providing by executing two wills did not happen. Neither son nor mother survived long enough to prove the will in his or her favour. The testator did not, apparently, contemplate, or make any provision for, the events which in fact happened, namely, that all three—father, wife and son—should die in one and the same happening.

It remains to consider whether there is any evidence of survivorship or, failing evidence, whether the presumptions which are provided by s. 184 of the Law of Property Act, 1925, arise. The evidence was that all three—father, mother, and son—were killed by the explosion of a parachute bomb or land mine which demolished the house in which they were all three sleeping, husband and wife in one room and the son in another on another floor. There were only scattered remnants of the bodies of the parents to be found, but the body of the son was found apart, but not dismembered. I do not find it possible on that evidence to say which of the three died first, and, therefore, unless the proper conclusion from the evidence is that all three died simultaneously, the presumptions provided by the statute prevail. The judgment of the Court of Appeal in *In re Grosvenor* (1), makes it clear that there are circumstances in which it is proper in a court of law to draw the inference, despite physical or metaphysical difficulties, that two or more persons died simultaneously—where, for instance, as in that case, persons were close together in a single shelter which received a direct hit from a bomb—but I do not think the facts in this case are so closely parallel that I am constrained to any such finding as to all three of them. Not only were the three persons in this case not, so far as the evidence of their normal sleeping arrangements goes, in close proximity to one another when the explosion took place, but also the effect on the two of them, who would normally be sleeping together, was such as to dismember their bodies, whereas the body of the third, who slept on another floor of the house, was, as I have said, found apart and not mutilated.

I, therefore, conclude that they did not die simultaneously, and, consequently, the presumption of the statute operates. Following the presumption, the son was the survivor of his parents, but, the father having died intestate for the reasons I have given, the wife, if she survived to become a widow,

(1) [1944] Ch. 138.

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would be entitled to her statutory portion of the estate, and this would, in turn, descend to her son by virtue of s. 9 of the Legitimacy Act, 1926. It, therefore, becomes necessary to determine whether the wife survived her husband in fact or by presumption. It appears to me that *In re Grosvenor* (1) constrains me to find that the death of the parents were in law simultaneous. I cannot distinguish the facts of this case, as they affect the two parents, from the facts in that case. I must, therefore, find that there was no survivorship in fact, and, therefore, there is no presumption that one or other of the two parents died first. Hence the wife takes nothing, and the son takes nothing from her. The result is that the plaintiffs succeed, and that there will be a pronouncement for an intestacy.

Solicitors: *Watson, Sons & Room; Treasury Solicitor; James W. Baldon.*

(1) [1944] Ch. 138.

T. A. H.

THE STEAUA ROMANA; THE OLTENIA.

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Feb. 16, 17; *Mar.* 17.

Shipping—Prize—Condemnation—Enemy ships—Wireless apparatus owned by allied claimants—Contract of hire between claimants and Crown—Liability of apparatus to condemnation—"Tackle, furniture "and apparel"—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 2.

In August, 1939, the claimants, a Belgian company (subsequently and at all material times domiciled in London), installed wireless apparatus in two Rumanian ships under a contract by which the apparatus remained the property of the claimants, but was hired to the shipowners for a term of five years. In October, 1940, the ships were requisitioned by the government of Kenya. In February, 1941, Rumania was declared to be an enemy country for the purposes of the Trading with the Enemy Act, and in December, 1941, Great Britain became at war with Rumania and the ships were seized as prize. By an exchange of letters in June and July, 1941, the Ministry of Shipping had agreed to hire the wireless apparatus from the claimants at the same rates of hire as the shipowners had been paying.

By s. 2 of the Naval Prize Act, 1864, "ship" includes "tackle, "furniture and apparel," and the procurator-general contended that the wireless apparatus should be condemned as part of the tackle or apparel of the ship:—

Held, (*a*) that the original contract with the shipowners had been frustrated and terminated automatically when Rumania was

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declared to be an enemy country, and that the contract with the ministry was a new contract; (*b*) that the court ought not to hold that the Crown, having hired the apparatus through one officer, would order another officer to seize the ships without impliedly excluding the apparatus so hired; but if driven to hold that the apparatus was deliberately included in the seizure, that such seizure was inconsistent with the Crown's own contract, and that, accordingly, in either case, the apparatus was not subject to condemnation.

The Schlesien (1914) 1 Br. & C. P. C. 13, distinguished.

ACTIONS OF PRIZE.

In these cases, transferred from the Prize Court of Kenya, the Crown sought condemnation of two Rumanian ships, the *Steaua Romana* and the *Oltenia*. The claimants, the Société Anonyme Internationale de Telegraphie sans Fil, a Belgian company, claimed that certain wireless installations fitted in the ships were their property and not subject to condemnation. The ordinary commercial domicile of the claimant company had been in Brussels, but on May 12, 1940, before Germany had occupied Brussels, the company passed a resolution transferring its headquarters to London. On May 24, 1940, the claimants acquired a temporary licence from the Crown under the Trading with the Enemy Act, and on October 15, 1941, were registered in this country under the Companies Acts. It was admitted that they had acquired a commercial domicile entitling them to prosecute their claim.

By an agreement in writing made on August 19, 1939, between the claimants and the owners of the ships, a Rumanian company, the claimants agreed to install in each of the ships a set of apparatus comprising direction finder, auto-alarm echo-meter, sounding device and wireless telegraphy installation. The annual rental per ship was 360*l.*, payable quarterly in advance, with a provision that, if the rent should remain unpaid for a period of one quarter after becoming due, the claimants should have the right to enter on the ships and remove the apparatus. The claimants undertook during the continuance of the contract, which was for a term of five years, to keep and maintain the apparatus, which was declared to remain their absolute property, in working order and condition at their own expense. On October 16, 1940, both ships were in Mombasa and on that date were requisitioned by the government of Kenya under the Defence of the Realm Regulations in force in that colony. At that time, the relations of this country with Rumania continued to be friendly, but on

February 15, 1941, by Regulation No. 189 of 1941, Rumania was declared to be an enemy country for the purposes of the Trading with the Enemy Act, though, at the time this country was not actually at war with Rumania, an event which did not occur until December 8, 1941. At the time of the requisition of the ships in Mombasa, the contract charges for the third quarter of 1940 were unpaid in respect of both vessels and application therefor was made by the claimants to the branch of the shipowners in London, Steaua Romana (British), Ld., who informed the claimants of the requisitioning of the vessels and advised them to collect the contract charges due from the Ministry of Shipping. On December 23, 1940, the claimants were referred by the Ministry to the British Tanker Co., Ld. who had been appointed managers of the vessels on behalf of the ministry after they had been requisitioned, and were authorized by the ministry to pay the contract charges in respect of the claimants' apparatus on production of a copy of the licence from the Trading with the Enemy Branch of the Board of Trade. On June 11, 1941, the Director of Ship Management at the Ministry of War Transport wrote to the claimants with reference to the requisitioning of the vessels, complaining that the rate of hire was in excess of that paid for hire and maintenance "on other ministry-owned vessels," but on July 1 he agreed that the hire should be payable at the rates already in force. On November 13, 1941, the managers asked for confirmation that the period of the contract was from August 19, 1939, for five years. In December, 1941, the vessels arrived at Capetown and they were "derequisi-" "tioned," seized in prize and again requisitioned.

Owen Bateson for the procurator-general. The seizure of the ships in prize was seizure as they stood with their gear and everything in them, for, in the words of the Naval Prize Act, 1864, "ship" includes "tackle, furniture and apparel." This case is covered by the decision in *The Schlesien* (1); see also *Hogarth* v. *Walker* (2). The Ministry of Shipping merely adopted the original contract and did not enter into a fresh contract.

Sir Robert Aske K.C. and *Stephen Murray* for the claimants. This is a totally different case from *The Schlesien* (1) where the ownership of the wireless apparatus was not established and, therefore, the latter part of the judgment is obiter. Here it is

(1) 1 Br. & C. P. C. 13. (2) [1900] 2 Q. B. 283.

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admitted that the claimants, who are allies, are the owners. After Rumania became an enemy country under the Trading with the Enemy Act the contract with the shipowners would have involved the claimants in trading with the enemy, and, therefore, it came to an end: see *Ertel Beiber & Co.* v. *Rio Tinto Co.* (1); *Joseph Constantine S.S. Co.* v. *Imperial Smelting Corp., Ld.* (2); *Bank Line, Ld.* v. *Arthur Capel & Co.* (3); and *Hirji Mulji* v. *Cheong Yue S.S. Co.* (4). The ministry entered into a fresh contract with the claimants, but even if, contrary to the claimants' submission, the ministry adopted the claimants' original contract, in either case the Crown, when it seized the ships, cannot be taken to have seized allied property on board which it had agreed to hire, and, if seized, it is not liable to condemnation.

Bateson in reply. Even if there was a fresh contract the Crown could still seize the property attached to enemy ships: *The Schlesien* (5), and in law is entitled to a decree of condemnation, although it may be that there is strong reason for the Crown to exereise its bounty.

Cur. adv. vult.

March 17. LORD MERRIMAN P. read a judgment in which he stated the facts and continued. The nationality of the ships is admitted in the affidavit filed on behalf of the claimants and is otherwise satisfactorily proved. The Crown's right to a decree of condemnation is accordingly established and I so hold.

Turning to the claim, it is important to consider the bearing of Rumania being declared to be an enemy country for the purpose of the Trading with the Enemy Act and the outbreak of war with Rumania on the contract between the claimants and the shipowners. Seeing that on the outbreak of war with Rumania the claimants had established a commercial domicile in this country, it is indisputable that the contract, if still in existence, was thereby frustrated, but Sir Robert Aske contended that, by the Trading with the Enemy Regulation of February 15, 1941, all communication between the claimants and the shipowners in relation to their duties under the contract, as well as the performance of the duties themselves, became illegal, as did also the receipt of the rent payable.

(1) [1918] A. C. 260, 276.
(2) [1942] A. C. 154, 169.
(3) [1919] A. C. 435, 454.
(4) [1926] A. C. 497, 507, et seq.
(5) 1 Br. and C. P. C. 13.

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The procurator-general has not sought to dispute this proposition. It seems to me to follow that the frustration of this contract followed automatically the making of that regulation as from its date; see *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1); *Bank Line Ld.* v. *Arthur Capel & Co.* (2); *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (3), and the summary of the principles applicable to the subject by Lord Maugham in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.* (4).

The argument of the Crown is based, in the first place, on the definition of the term "ship" in the Naval Prize Act, 1864, which "includes vessel and boat, with "the tackle, furniture and apparel of the ship, vessel or boat," but rests in the main on Sir Samuel Evans' decision in *The Schlesien* (5). In that case the claim concerned a submarine signalling apparatus, fixed partly in the forehold and partly in the chart room of an enemy ship. The claimants were a neutral company who alleged that they had leased the apparatus to the shipowner on terms which provided for the payment of rent and that the apparatus should remain the sole and exclusive property of the claimants. Sir Samuel Evans held that the evidence was not sufficient to enable him to say that the apparatus belonged to the neutral claimants and not to their agency in Bremen. As the burden of proof was on the claimants, that was sufficient to dispose of the case. The rest of his judgment was, therefore, in a sense, obiter. He proceeded, however, to discuss the question on the assumption that the claimants were owners of the property in accordance with the form of the lease exhibited to their affidavit. He said that it was obvious that in a ship of modern construction many kinds of apparatus similar to the one in question might be installed and form part of the ship and added: "I am far "from saying that if such things can be easily detached they "ought not to be handed over by the captors, if they think "fit, to the persons who appear to be the owners." He then referred to a general direction which he had given to the marshal about giving up such things as private chronometers, compasses, or sextants belonging to the captain and crew of a vessel, a direction which I have repeated during the present war, and went on to say: "But that is wholly different from

(1) [1918] A. C. 260, 276.
(2) [1919] A. C. 435, 454.
(3) [1916] A. C. 497, 50k, et. seq.
(4) [1942] 2 A. C. 154, 169.
(5) 1 Br. & C. P. C. 13.

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" stating that claimants have a right to come to this court and " say, 'This particular piece of apparatus affixed to this " 'vessel belongs to me, and I request you to adjudicate upon " 'it.' The Prize Court does not exist for this purpose. It " exists for the purpose of saying whether, having regard to the " ship as it stands, it is a subject-matter fit for condemnation " as prize. I have condemned this ship as prize, and I con- " sider that I am not called upon to investigate questions of " property in different parts of the ship, as to whether they " have been leased, and whether the property in them remains " in the original lessors. It is of great importance to do what " is fair and right to neutrals, but in a claim of this description " the matter must be dealt with by the executive and those " who advise the Crown; and if they think it clear that this " property belonged to the American owners they can deal with " it accordingly. As far as this Court is concerned, the " apparatus is to be considered as part of the ship which is " condemned."

For my part I am quite prepared to assume, even if I am not strictly bound, that this opinion was perfectly correct in relation to the subject-matter, but be it observed that Sir Samuel Evans was dealing with the case of a ship as to which the captors had no knowledge, express or implied, of the separate ownership of the apparatus in question and with a claim which was based solely on the bare ownership coupled with an alleged contract between the owners and the enemy shipowners. With such arrangements it may well be that the Crown, as captor, is in no way concerned. The analogy with the case of mortgagees seems to me to be very close. He was not dealing with anything resembling the very special facts with which I am here concerned.

In considering the letters exchanged in June and July, 1941, it should be remembered that the word " requisition " is not a term of art, and, as Pickford L.J. explained in *The Broadmayne* (1), does not connote the same state of things in every particular case. Requisitioning may be, and usually is, nothing more than a hiring of the ship which does not take the property in the ship out of the owner, though the owner has no alternative whether he will accept the proposition of hiring or not, or it may involve a taking over of the absolute dominion of the vessel, though this may not be ascertained in any given case until the terms are finally settled: see *The Sarpen* (2)

(1) [1916] P. 64, 73. (2) [1916] P. 306, 318.

per Pickford L.J. There is specific power under reg. 53, para. (2.) of the Defence (General) Regulations, 1939, which I am asked to assume applies, mutatis mutandis, to Kenya, whereby the competent authority which has requisitioned certain classes of property, including a vessel, may acquire the vessel by appropriate notice served on the owner, whereupon the period of requisitioning is brought to an end and the property in the vessel is vested in the competent authority free from any pledge, mortgage, lien or other similar obligation. It must be assumed from the so-called "derequisitioning" of these ships preparatory to their seizure in prize on the outbreak of war with Rumania that the period of requisition begun at Mombasa still subsisted and that the actual property in the vessels had not been acquired. Nevertheless, in the colloquial sense, all requisitioned ships, whether or not the property is actually acquired, may be described as "ministry-owned." It appears to be quite clear from the use of the word "*other*" in the phrase "other ministry-owned vessels" that the writer of the letter of June 11 was not intending to draw any distinction turning on the actual terms of their requisitioning. The significance of the ministry's argument that the rate of charges under the contract between the claimants and the shipowners was higher than that prevailing for similar hire and maintenance as between the ministry and the British wireless companies on "other ministry-owned vessels," is that it recognizes that such wireless installations in the case of ships requisitioned may be the subject of a separate hiring arrangement between the ministry and the owners of the apparatus. The fact that the ministry gave no notice to the claimants respecting the release of their apparatus when the ships were released as a preliminary to seizure tends, in my opinion, to support the inference that it was so in this case. It was not until April 24, 1942, that the managers, by letter of that date, contended that "the hire and maintenance arrangements" ended with the so-called "prizing" of these vessels, meaning, I suppose, their seizure in prize, while at the same time suggesting that the obligation on the claimants to maintain the apparatus subsisted and inviting them to submit proposals for an annual fee for this service, a contention which the claimants naturally rejected. In my opinion, the proper inference to be drawn from the exchange of letters in June and July, 1941, is that the ministry, on behalf of the Crown, agreed with the claimants to hire the apparatus at the rate specified for use in

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these ships and the claimants agreed to maintain the apparatus. As a matter of law I think that this is not a case of novation, but of an entirely new contract, since the old contract, if my view that frustration was effected by the Trading with the Enemy Regulation of February 15, 1941, is right, had been terminated automatically as from that date. Much stress was laid by counsel for the procurator-general on the letter of November 13, 1941, from the managers asking for confirmation that the period of the contract was for five years, and on the fact that on November 18, in applying to the British company for a copy of the contract, the claimants used the words, "as "you are probably aware, we made satisfactory arrangements "with the ministry for the continuation of our contracts." On this it was sought to found the inference that the claimants were clearly recognizing at the date of these letters that everything was still being done under their contract with the shipowners. I think that it is a fair inference from the letters exchanged in June and July, coupled with these two letters, that the parties intended to import into their agreement the terms of the old contract, so far as they were applicable, but, in my opinion, nothing turns on this. I do not think that a term that the Crown by unilateral action should be entitled to confiscate the subject-matter of the contract can fairly be implied, nor, in my opinion, is any such result brought about by Rumania subsequently becoming a belligerent enemy, for, by then, the claimants' contract was not with the enemy but with the Crown.

So far as concerns the ships the Crown thereby became entitled to seize them in prize and, pending adjudication, to obtain an order which altered the basis on which they were requisitioned, but that, in my opinion, does not determine the question whether the officer of the Crown making the seizure of the ships in prize can be taken to have intended to seize the apparatus, the subject of this agreement. It is true that the existence of the contract in this case has to be gathered from the letters read in light of all the circumstances, but precisely the same considerations would apply if a formal agreement of hiring had been drawn up in consideration of the claimants' refraining from removing their apparatus from the ships. For that matter the argument would apply equally in the case of an agreement made with a British subject, after the first requisition and before the seizure, for the installation and maintenance of apparatus not already in the ships. Counsel

for the procurator-general admitted that his argument went the full length of asserting that, in any such circumstances, seizure of the ships in prize automatically involved seizure of the apparatus, and he put forward this argument as a matter of principle based on Sir Samuel Evans' decision in *The Schlesien* (1). I agree that the argument raises a question of principle, but I do not think that it is the question of principle dealt with in *The Schlesien* (1). In my opinion, it is a question of principle of much wider application which governs all transactions purporting to be made in good faith.

When one speaks of this or that minister or officer of the Crown it must be remembered that all the time one is speaking of His Majesty the King acting through the appropriate minister or officer: see *Williams* v. *Howarth* (2). In fact, of course, the officer of the Crown effecting the seizure of these ships knew nothing whatever about the hiring and maintenance agreement made through another officer of the Crown, and, therefore, did not ignore it deliberately. Likewise, until the point was brought out in the argument of the claimants' counsel, the officer of the Crown who makes this claim for condemnation was, apparently, unaware of the existence of the Trading with the Enemy Regulation affecting Rumania and its bearing on the case, but I have to deal with the matter as it now stands and to ascertain, if I can, what was really seized, when no discrimination was, in fact, made. I decline to hold that His Majesty, having been pleased through one officer to hire the apparatus, would be capable of ordering another officer to seize these ships without impliedly excluding the apparatus so hired. If these installations are not to be taken as having been seized no question of their condemnation arises. If, however, contrary to what I believe is the true position, I am driven to hold that they were deliberately included in the seizure, I hold that their seizure is inconsistent with the Crown's own contract and that the claimants have made good their claim that in the special circumstances of this case they are not subject to condemnation. In either case the claimants succeed.

After argument the President said that the rules about costs in prize were very strict. There was a legitimate argument on principle raised by *The Schlesien* (1), and, although he had

(1) 1 Br. & C. P. C. 13. (2) [1905] A. C. 551.

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THE STEAUA ROMANA; THE OLTENIA.

great sympathy with the contentions of the claimants, he must hold that there should be no order as to costs.

Solicitor for procurator-general: *Treasury Solicitor.*

Solicitors for claimants: *Coward, Chance & Co.*

E. C. M. T.

1944

Feb. 11, 21.

STEVENSON (OTHERWISE BOWERBANK) *v.* STEVENSON.

Divorce—Nullity—Alimony—Alimony pendente lite—Payment after decree nisi.

An order for alimony pendente lite made in nullity proceedings in favour of a wife against whom a decree nisi is made on the ground of her wilful refusal to consummate the marriage does not cease to have effect when the decree nisi is pronounced, but continues until the marriage has been annulled by the decree absolute or until the order is discharged or varied by a further order of the court.

SUMMONS adjourned into court.

In October, 1942, a wife petitioned for a decree of nullity on the ground of the husband's impotence, or, alternatively, his wilful refusal to consummate the marriage. The husband, in his answer, admitted that the marriage had not been consummated, but alleged that the failure was due to the wife's impotence, or, alternatively, to her wilful refusal, and he asked for a decree of nullity. In June, 1943, the registrar made an order that the husband pay to the wife alimony pending suit at the rate of 2*l.* a week to begin from the date of the service of the petition. In November, 1943, the suit was heard and a decree nisi was pronounced in favour of the husband. The husband ceased to pay alimony to the wife from the date of the decree nisi, and on February 2, 1944, the wife took out a summons asking for an order that alimony pending suit be continued until decree absolute.

Fairweather for the wife.
Clifford Mortimer for the husband.

Cur. adv. vult.

Feb. 21. BUCKNILL J. read the following judgment. The first question for decision is whether the order of June, 1943,

to pay alimony pending suit automatically continues until decree absolute or terminates with the decree nisi, subject, of course, to any order by the court varying the original order. No guidance on the matter can be obtained by reference to the practice of the ecclesiastical courts before 1857 inasmuch as there was then no intervening period, such as there is now, between the decree nisi and the decree absolute. This period did not exist in the original Act of 1857, but was introduced by amending Acts and was at first three months and subsequently extended to six months. The amending Acts, however, did not deal with the question of payment to the wife during this period. They merely, as now, made provision for interim orders pending suit, and final orders after decree absolute. The absence of any such provisions to meet the case of an innocent wife who has succeeded in obtaining a decree nisi strongly indicates that the order for alimony pendente lite was intended to include the period between decree nisi and decree absolute. As Cotton L.J. said in *Ellis* v. *Ellis* (1), " until the decree becomes absolute the parties are " still husband and wife." In that case the Court of Appeal upheld the decision of Sir James Hannen that the court had power to order alimony pendente lite after a decree nisi had been made dissolving the marriage. Lord Herschell in *Foden* v. *Foden* (2) also made it clear that a petition continues until decree absolute. " It was said," Lord Herschell remarked, " that there was no pending suit, because a decree nisi had " been made. That argument is, in my opinion, quite " untenable. Till the decree nisi has been made absolute, the " suit is clearly pending." If, then, the suit is pending and the order is to pay alimony pending suit, prima facie the order continues in force until the suit is finally determined by decree absolute.

However, when a wife is found guilty of adultery without any extenuating circumstances, the practice is that alimony pendente lite automatically ceases unless the court otherwise orders. Such a practice was approved by the Court of Appeal in *Dunn* v. *Dunn* (3). In that case Cotton L.J. said : " Until " adultery has been proved against the wife she is entitled to " support and the court gives her alimony pendente lite. But " when her adultery has been proved, though she is still " a wife she has lost that right." Lindley L.J. added that

(1) (1883) 8 P. D. 188, 189.
(2) [1894] P. 307, 312.
(3) (1888) 13 P. D. 91, 93.

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Bucknill, J.

Wells v. *Wells* (1) admitted the principle that, where the wife is satisfactorily proved to have been guilty of adultery, her alimony ceases. In the course of his judgment in that case Lord Penzance said : " It is a principle in this and other " courts, that so soon as a wife shall have been false to her " marriage vow, she loses the right she had to her husband's " support. Keeping this principle in view, it would be nothing " less than making the name of the thing paramount to its " substance, if the court were to hold that after adultery proved " the alimony must still be paid because the ' lis ' continued " ' pendens.' I am therefore of opinion that, although other " undecided matters in controversy may keep the suit alive, " the right to alimony perishes on the final conclusion of " the wife's guilt. When the cause is tried before the court " itself, that final conclusion will have been reached when the " court declares its judgment on the facts, for in this court " such judgment is final. And if an appeal carries the case " forward, it also carries it into another court competent to " allot alimony if it pleases."

These cases indicate that the reason why alimony pendente lite automatically ceases as soon as the court finds the wife guilty of adultery is that in such a case she loses the right to her husband's support in accordance with the rule of the common law. Nevertheless, as appears from the judgment of Lindley L.J. in *Dunn* v. *Dunn* (2) the trial judge has power to continue to give alimony pendente lite after the wife has been found guilty of adultery. " If the verdict is against her," said the lord justice, " the onus must lie upon her to show that " the alimony ought to be continued. The judge ought to " have power to give it to her, but I think it would be wrong " to hold that without further order it continues after an " adverse verdict." As an illustration of this power, the Court of Appeal has held that alimony pendente lite may be granted to a petitioning wife who has already been found guilty of adultery if her husband has conduced to her adultery by his conduct : *Welton* v. *Welton* (3). Lord Hanworth M.R. in that case stated as a general principle that there is power to make an order for alimony pendente lite in the case of a wife already convicted of adultery if she is a competent suitor for a decree of divorce on the ground of her petitioning husband's adultery. Moreover, a petitioning wife who has

(1) (1864) 3 Sw. & T. 542, 545.
(2) 13 P. D. 91, 94.
(3) [1927] P. 162, 167.

in her discretion statement admitted her own adultery, but is petitioning for a decree on the ground of her husband's misconduct, is not thereby debarred from obtaining or holding an order for alimony pendente lite. Lord Merrivale in *Welton* v. *Welton* (1) merely indicated that in such a case the order for alimony pendente lite would probably be refused or discharged. In *Bullock* v. *Bullock* (2), Langton J. pointed out that *Welton* v. *Welton* (1) is very clear authority "for the "proposition that the mere fact that the woman has admitted "adultery, important as it may be, is not always a bar to an "application" for alimony pendente lite.

The question, therefore, is whether the practice that alimony pendente lite automatically ceases in the case of an adulterous wife should be applied to the case of a wife against whom a decree has been made on the ground of her wilful refusal to consummate the marriage. The answer to this question depends, in my view, on whether there is any substantial difference between a wife found guilty of adultery and a wife who has wilfully refused to consummate the marriage. In my opinion, there is a substantial difference. On the other hand, I see no substantial difference between the present case and the case of a wife whose invincible repugnance to the sexual act in former days enabled the court to grant a decree nisi annulling the marriage on the ground of her impotence in that particular union. The conduct of an impotent wife clearly does not call for the censure which her adultery would invoke, neither does it, to my mind, relieve the husband from the liability to support her whilst she remains his wife.

In *S.* v. *B.* (3), where a decree nisi had been granted on the ground of the wife's impotence and an application was made for the alimony pending suit to continue until decree absolute, Lord Penzance's judgment in *Wells* v. *Wells* (4) from which I have quoted, was cited in argument, but Sir James Hannen held that in case of nullity alimony pendente lite continues payable until the decree absolute. I do not see why in the present case the conduct of the wife should automatically relieve the husband from his liability to maintain her until the marriage has been annulled by decree absolute. In this connexion I adopt the words of Sir Francis Jeune in *Foden* v. *Foden* (5), a nullity case, where he said: "I think it more

(1) [1927] P. 162, 167.
(2) [1942] P. 134, 135.
(3) (1884) 9 P. D. 80.
(4) 4 Sw. & T. 542.
(5) [1894] P. 307, 311.

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" prudent to adhere to the principle that, as a rule, a marriage " de facto carries the right to alimony pendente lite until it is " finally declared to be void." On appeal (1) Lord Herschell appears to have adopted the same principle when he said: " There are obvious reasons why an alleged wife should " receive maintenance from her husband until her status has " been finally determined by the decree of the court."

I, therefore, find in this case that the order of alimony pendente lite continues in force until the decree absolute or until the order is discharged or varied by order of the court. It is always open to the husband to apply to the court for such an order.

Solicitors for wife: *Marcy, Russell Cook & Co.*
Solicitors for husband: *Pritchard, Englefield & Co.*

(1) [1894] P. 307, 313.

T. A. H.

1944
Feb. 22;
Mar. 7.

WISE (OTHERWISE BLAKELEY) *v.* WISE.

Divorce—Nullity—Practice—Pleading—Particulars—Impotence.

In a proper case the court will order a female petitioner in nullity proceedings who alleges that the respondent has been and is incapable of consummating the marriage to give to the respondent particulars of the nature of the incapacity alleged.

SUMMONS adjourned into court.

The female petitioner instituted proceedings for nullity of her marriage with the respondent, alleging that he was at the time of the ceremony of marriage and had ever since been incapable of consummating it. The respondent took out a summons asking for an order that the petitioner should give particulars of the nature of the incapacity alleged. The registrar refused to make the order, and the respondent appealed to the judge.

Holroyd Pearce for the petitioner.
Fairweather for the respondent.

Cur. adv. vult.

March 7. HODSON J. read the following judgment. This is an application for particulars of a plea contained in the petition of a female petitioner alleging that the respondent was at the time of the ceremony of marriage and has ever since been incapable of consummating the same. The registrar

refused to order particulars of the nature of the incapacity, and the respondent has appealed against that refusal. It was suggested that there was an inveterate practice of the court not to order such particulars, at any rate, in cases where the petitioner was a female, although it was conceded that a similar order had been made on a number of occasions where the position was reversed. I cannot see that there can be any distinction in principle between the two cases, although it is obvious that in many suits for nullity on the ground of incapacity there can be nothing to gain by making such an application. Accordingly, such applications are unlikely to be common. Since the matter was adjourned into court I have not been able to discover that any order such as is asked for in the present case has ever been obtained by a male respondent, although it may be that such particulars have been given in response to a request for particulars without the compulsion of an order.

It is to be borne in mind that in a suit for nullity on the ground of incapacity medical inspectors are appointed by the court and their report is available to both sides and will in most cases disclose any incapacity which is apparent on inspection. This does not necessarily dispose of all those cases where physical malformation is alleged to exist, and it is always open to the parties to call expert or other evidence in addition to that of the medical inspectors appointed by the court. There remain the cases where no incapacity is apparent, and yet incapacity to consummate the particular marriage is said to exist. Such cases by far outnumber those where any malformation can be found.

It has been argued on behalf of the petitioner that the pleading is sufficient as it stands, and that in law it is no more correct to order particulars of incapacity to perform a particular act than to order particulars of failure to do so. This argument is not, I think, well-founded since an allegation of incapacity to perform an act goes further than a mere allegation of failure. It is not a mere negative averment, but an allegation that a condition of things exists which can be more particularly defined. Indeed, failure to consummate the marriage is alleged separately by para. 2 of the petition and no application for particulars is made in respect of this paragraph.

It is, no doubt, true that it would be frivolous in many classes of action to apply for particulars of the nature of incapacity where the mere fact of inability to perform a particular act is alleged in pleading. On the other hand,

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incapacity may take many forms, and in a suit for nullity based on this ground it is not unreasonable on the face of it for the person against whom the allegation is made to be put on his guard so that he may be prepared at the trial with expert or other evidence to meet the case brought against him. This is in accordance with the often quoted passage contained in the judgment of Cotton L.J., in *Philipps* v. *Philipps* (1), where he said : " In my opinion it is absolutely essential that " the pleading, not to be embarrassing to the defendants, " should state those facts which will put the defendants on " their guard and tell them what they have to meet when " the case comes on for trial."

The petitioner has further argued that, even if theoretically the respondent may be entitled to particulars, yet such an order should be refused for what have been described as practical reasons. It is said that the parties themselves are the only possible witnesses who can deal directly with capacity or incapacity, and that the expert witnesses, if any, must necessarily, in giving their evidence, deal with the facts deposed to by the parties after having an opportunity of considering those facts. Hence nothing is to be gained, it is said, from particularizing the allegation in detail before the trial. I do not think that this conclusion is correct, for it might be that, having heard the evidence called on behalf of the petitioner, the respondent might find that he had not brought witnesses with the necessary qualifications to deal adequately with that evidence, and he might be put in the position of having to seek an adjournment in order to apply himself to that purpose.

It is further argued that it is practically impossible to comply with an order for particulars of the nature of the incapacity without pleading the evidence in support of the allegation. I do not think that this objection is well-founded. In stating concisely the nature of the incapacity alleged there is no necessity to set out in detail the evidence to be adduced to prove the fact. I, therefore, hold that the respondent is entitled to the order asked for in this case, that is to say, that particulars of the nature of the incapacity alleged should be filed and delivered by the petitioner within fourteen days.

Solicitors for petitioner : *Kenneth Brown, Baker, Baker.*
Solicitors for respondent : *A. E. Hamlin, Brown & Co.*

(1) (1878) 4 Q. B. D. 127, 139.

P. B. D.

C. A.
1944
Feb. 4.

BERTRAM *v.* BERTRAM.

Divorce—Cruelty—Condonation—Resumption of cruelty—Failure to plead condonation.

In the case of a wife's petition for divorce on the ground of cruelty, which she had condoned, very slight evidence of a resumption of the cruelty condoned is needed, as shewing cruelty of character, to prevent the condonation from being a bar to the petition.

The fact that condonation is not pleaded by the respondent does not prevent the judge from investigating and adjudicating on facts which seem to show condonation where those facts transpire in the evidence of the petitioner himself or herself.

APPEAL from Hodson J.

The parties were married on December 21, 1935. Some time after the marriage the husband entered on a course of conduct which amounted to cruelty, namely, he persistently lived on the wife's means, forced her to get money from her father, continually pawned his own, her and their joint property, and bought things on credit to pawn them, so that the wife was continuously miserable, and, according to the medical evidence, suffered seriously in her health. After a period the parties separated, but in May, 1942, the wife condoned the husband's cruelty, and the parties resumed cohabitation. Soon afterwards, however, the husband resumed his cruel conduct, and in August, 1942, the wife wrote to the husband putting an end to the married life, and on April 12, 1943, she filed her petition for a dissolution of the marriage on the ground of her husband's cruelty. In his answer, the husband did not plead condonation. On November 24, 1943, Hodson J. granted the wife a decree nisi, holding that, owing to the resumption of cruelty by the husband, her right to a decree was not barred. The husband appealed.

Hollins for the husband.
Beyfus K.C. and *Victor Williams* for the wife.

SCOTT L.J. Hodson J. gave the wife her decree on the ground of cruelty, and there is no criticism by Mr. Hollins, who appears for the husband, of the decision of the judge that the husband had been guilty of cruelty. Mr. Hollins, however, points out that early in the spring of 1942, the parties, after being separated for some time, and after the

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wife had suffered greatly in health through the husband's conduct, resumed cohabitation until August, 1942, and he submits that, by so returning to her husband, the wife condoned his cruelty, and that, therefore, the judge was wrong in granting a decree.

Hodson J., however, made the decree because he was satisfied that there were acts of cruelty by the husband after the resumption of marital intercourse, with the result that there was no effective condonation. In that he followed what was obviously the right principle, namely, that condonation ceases to be a bar, if, after it, there is a resumption in any degree of the same kind of conduct as would have justified a decree of divorce had there been no condonation. In a case depending on adultery more may be necessary, but in one of cruelty very slight fresh evidence is needed to show a resumption of the cruelty, for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out.

The kind of cruelty in the present case was not ordinary physical cruelty, but the cruelty committed by a husband who deliberately and persistently lives on his wife's means, forces her to get money from her father, continually pawns everything, buys things on credit for the purpose of pawning them, pawns many of the household articles, and does it all in such a way as to make his wife continuously miserable and cause her seriously to lose her health. In a case of that kind it wants very little fresh evidence to negative condonation. The mere fact that the wife takes back the husband means little especially where she has had a great devotion towards him personally. I agree with the judgment of the learned judge.

GODDARD L.J. I agree with the view taken by Hodson J.

DU PARCQ L.J. It is always important that, when the evidence of the petitioner, whether in chief or in cross-examination, suggests that there may have been condonation, the court should go carefully into the matter. I say this because I observe the following note in Rayden on Divorce, 4th ed., p. 137, on the subject of condonation: "It "may be doubted whether a party may call evidence or cross-"examine upon a matter which he has not pleaded." That is a very cautious note, and I desire to be equally cautious in

anything I say, but I think that, although that doubt may be permissible, judges trying cases of this kind ought not to be troubled by it. It is of great importance that the question of condonation should be gone into. The matter can safely be left to the discretion of the judge in each case. Of course, condonation ought to be pleaded, and, if it is not pleaded, the judge will necessarily have regard to that fact, but the fact that it is not pleaded must not cause him to shut his eyes to the necessity of a full investigation. In the present case it is not disputed that there was what amounted to condonation, but in such a case as this little evidence may be required to show that, after the condonation, the husband did not turn over a new leaf, and to entitle the wife to say that her forgiveness has been in vain. Here there was abundant evidence to prove that the wife's forgiveness was in vain. I entirely agree with the judgment of the learned judge, and agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for husband: *J. & P. J. F. Chapman-Walker.*
Solicitors for wife: *Withers & Co.*

W. L. L. B.

SAFFORD *v.* SAFFORD.

Divorce—Insanity—"Continuous care and treatment"—Absence from institution on trial—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *ss.* 2 (*d*); 3 (*a*).

On a wife's petition for divorce on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for upwards of five years immediately preceding the petition, it was *held* that absences within the five years for periods of less than four days under s. 275, sub-s. 5, of the Lunacy Act, 1890, and absences for longer periods under s. 55 of the Act, the husband being placed in every instance under the care of a relation, were not interruptions of the detention required by s. 3 of the Matrimonial Causes Act, 1937.

Green v. *Green* [1939] P. 309, approved though for different reasons. *Shipman* v. *Shipman* [1939] P. 147, disapproved.

Decision of Lord Merriman, P. [1944] W. N. 99, reversed.

APPEAL from Lord Merriman P. (1).

On January 14, 1933, the wife, Eva Thomas, was married to Harold Safford. On August 15, 1937, a reception order was

(1) [1944] W. N. 99.

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made under the Lunacy and Mental Treatment Acts, 1890 to 1930, for the reception and detention of the husband as a rate-aided patient in the East Riding of Yorkshire Mental Hospital. On October 2, 1937, the husband was discharged as recovered, but on December 7, 1937, a second reception order was made which was still in force. On January 25, 1943, the wife petitioned for a dissolution of the marriage on the ground that the husband was incurably of unsound mind and had been continuously under care and treatment for at least five years immediately preceding the date of the petition. By an affidavit, dated May 28, 1943, the medical superintendent of the mental hospital gave evidence that the husband had been incurably insane since his admission to the hospital on December 7, 1937, and that since that date the reception order had been continuously in force. In exercise of his powers he had from time to time permitted the husband to visit his father for periods not exceeding four days. In addition two visitors to the hospital had on his advice twice granted to the husband under s. 55, sub-s. 1, of the Lunacy Act, 1890, leave of absence " on trial " with his father. The first occasion was from June 27, 1942, to July 12, 1942, and the second from July 18, 1942, until September 12, 1942. The latter period was curtailed by the father who brought the husband back to the mental hospital on September 1, 1942, owing to his condition having become less good. During those periods of leave " on trial " the reception order continued in force, and the husband was under the control of his father who promised to keep him under observation and to report from time to time, and on each occasion the husband was taken from, and brought back to, the hospital by his father. The object of giving leave " on trial " to a patient was to see whether his conditions were improved by a change of surroundings. Lord Merriman P., held, following his decision in *Shipman* v. *Shipman* (1), that, owing to the absence " on " trial " for substantial periods the requirement that there must be continuous detention in the mental institution itself or, as in *Green* v. *Green* (2), in what could fairly be regarded as the equivalent of the institution had not been satisfied, and so the petition must be dismissed. The wife appealed.

Tolstoy (*Grazebrook K.C.* with him) for the wife. To found a petition under s. 2 (*d*) of the Matrimonial Causes Act, 1937,

(1) [1939] P. 147. (2) [1939] P. 309.

the petitioner must show that the respondent has been a person of unsound mind "continuously under care and treatment "for a period of at least five years immediately preceding "the presentation of the petition." By s. 3 a person of unsound mind is to "be deemed to be under care and "treatment while he is detained in pursuance of any order or "inquisition under the Lunacy and Mental Treatment Acts, "1890 to 1930." Here the husband was continuously detained under the reception order made on December 7, 1937, and that continued while he was allowed to go to his father "on trial" under s. 55 of the Lunacy Act, 1890. That was part of the "care and treatment" and during the two periods when that happened the father had charge of the husband and reported the medical superintendent. In this respect the present case differs from *Shipman* v. *Shipman* (1), the previous decision of the President which he has followed, for there no provision was made that the patient's sister should be responsible for him. In *Green* v. *Green* (2) the patient, when away, was still under a measure of restraint which the President thought sufficient to make the detention continuous. It is difficult to understand why the President did not regard the periods of four days when the husband was allowed to go to his father under s. 275, sub-s. 5, of the Lunacy Act, 1890, as breaks in the detention, yet took that view with regard to the longer periods of leave on trial granted under s. 55 of the Act. Both had as their object the improvement of the husband's condition, and neither affected the continuous operation of the reception order.

Holroyd Pearce and *Comyn* for the Official Solicitor. The official solicitor would welcome a decision that the detention was continuous. The question for decision is really whether the order for detention was reasonably carried out throughout. He would leave the matter to the court.

Cur. adv. vult.

May 26. The following judgments were read by LORD GREENE M.R. and MACKINNON L.J. and concurred in by LUXMOORE L.J.

LORD GREENE M.R. By s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as substituted for the original s. 176 by s. 2 of the Matrimonial Causes Act, 1937), a petition for divorce may be presented on the ground that the

(1) [1939] P. 147. (2) [1939] P. 309.

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respondent is "incurably of unsound mind and has been "continuously under care and treatment for a period of at "least five years immediately preceding the presentation of "the petition." By s. 3 of the last-mentioned Act a person of unsound mind is to be deemed to be under care and treatment "(*a*) while he is detained in pursuance of any order or in- "quisition under the Lunacy and Mental Treatment Acts "1890 to 1930 . . . . and not otherwise." The wife petitioned for divorce from her husband alleging that (as the learned President held) he was incurably of unsound mind and that he had been continuously under care and treatment for the statutory period. She alleged continuous detention under the Lunacy and Mental Treatment Acts at the East Riding Mental Hospital at Beverley pursuant to a reception order made on December 7, 1937. The order was in the usual statutory form for a rate-aided person. It certified that the husband was a person of unsound mind and was a "proper person to "be taken charge of and detained under care and treatment" and directed the superintendent of the hospital to receive him as a patient. At the date of the presentation of the petition the order was still in force pursuant to s. 38, sub-s. 4, of the Lunacy Act, 1890, as amended by s. 7 of the Lunacy Act, 1891. From the date of the reception order down to the presentation of the petition the husband remained at the hospital save for certain periods of absence. These periods fall under two classes. Under the powers conferred by sub-s. 5 of s. 275 of the Lunacy Act, 1890, and regulations made thereunder, the husband was granted leave of absence by the medical superintendent on nineteen occasions amounting in all to forty-three nights. Of these occasions, five were for three successive nights and fourteen were for two successive nights. The maximum period allowed by the sub-section is four days. All these periods of absence were spent by the husband at his father's house. The other class consisted of absences on trial permitted by two visitors of the hospital with the advice in writing of the medical superintendent under sub-s. 1 of s. 55 of the Act. There were two leaves of absence granted in this way, one in 1942, which lasted for two weeks and one day, and the other, later in the same year, which lasted for six weeks and three days, some eleven days less than the period for which leave had been granted. On each of these occasions the husband was under the control of his father who promised to keep him under observation and to report from time to time

as to his condition to the medical superintendent. The father duly carried out this promise. On the second occasion he brought the husband back to the hospital before the expiration of the period of absence owing to his condition. He did so pursuant to instructions given to him when the leaves of absence were granted. The learned President dismissed the petition on the ground, putting it shortly, that the two last-mentioned absences constituted an interruption of the detention which is required to exist during the statutory period. The absences of the first class he considered might be disregarded under the principle of de minimis. In taking this view, he followed previous decisions of his own. Before considering these decisions and that in the present case it will be convenient to make my own examination of the relevant statutory provisions.

By s. 3 (*a*) of the Matrimonial Causes Act, 1937, " detention " pursuant to an order under the Lunacy and Mental Treatment Acts, 1890 to 1930, is made the sole test of the continuous " care and treatment " which has to be established under s. 176 (*d*) of the Supreme Court of Judicature (Consolidation) Act, 1925, in its present form, so far as it applies to the present case. In using the phrase " care and treatment " and " detention " the legislature clearly had in mind the language of the Lunacy Act, 1890, in which both those phrases often appear, and, what is more important, often appear in collocation. Neither of them is defined in the Lunacy Act, 1890, and their meaning is to be ascertained by considering the Act as a whole. Examples of the collocation of the two phrases are to be found in s. 11 under which an urgency order may be made for the reception and detention of an alleged lunatic where it is expedient that he be forthwith placed under care and treatment. In s. 13, sub-s. 2, the phrase appears; " a proper person to be taken charge of and detained under " care and treatment," and the same phrase appears in the statutory forms, see form 8 (the form of the certificate of the medical practitioner) and, in particular, forms 12 and 15 which are the forms of reception orders. Thus, the reception order itself is based on the justice's certificate that the lunatic is a proper person to be detained under care and treatment. Care and treatment are the object of the detention. When the detention comes to an end, care and treatment come to an end. When care and treatment are no longer required, the detention is brought to an end by discharge. The part of the

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Act which is concerned with care and treatment is part II., which is headed "Care and Treatment." Part II. is sub-divided under a number of sub-headings relating to care and treatment, one of which is "Absence on Trial or for Health." It is under this sub-heading that s. 55 is found. This appears to me to be a matter of crucial significance for the decision of this appeal. Section 55 provides for three classes, namely, absence on trial under sub-ss. 1, 3 (*b*), and 6; the sending or taking of a private patient to a specified place for the benefit of his health under sub-s. 3 (*a*); and, under sub-s. 7, absence (not for any specified purpose) for a period not exceeding forty-eight hours by permission of the medical officer of a hospital or licensed house. It seems to me to be clear that all these absences are treated by the legislature, not as an interruption of the care and treatment with which part II. is dealing, but as part of the care and treatment. They are methods of taking care of and treating the patient and obviously are or may be highly beneficial when the circumstances are such as to make them justifiable. Now, if these absences are not interruptions of, but methods of providing, care and treatment, and if I am right in thinking that detention is for the purpose of care and treatment, it must, I think, follow that they ought not to be regarded as interruptions of the detention. Detention is, I think, a matter, so to speak, of status during the existence of which certain methods of care and treatment are prescribed. If this view is right, detention is not interrupted by the application of these methods.

That detention is to be regarded rather as a status than as the physical fact of being kept under lock and key is, I think, confirmed by a consideration of certain other provisions of the Act. As Luxmoore L.J. pointed out during the argument, under s. 116, sub-s. 1, the powers and provisions of part IV. of the Act relating to management and administration apply to "every person lawfully detained as a lunatic though not so "found by inquisition." It cannot be said that the powers of the court or of the maintenance and administration department do not exist or are suspended or in any way affected during a period when the patient is absent on trial under s. 55. Yet this would appear to be the result if it were true to say that during such periods the patient is not "detained." There are other sections which point in the same direction. Thus under s. 38, sub-s. 2, the commissioners may in the case of any institution direct that the reception orders of patients

detained therein shall expire as therein mentioned. Such a direction must surely cover the case of a patient who at the time is absent on trial without the necessity of bringing him back to the institution before the direction can be effective. Similarly, under s. 76, sub-s. 1, where commissioners make an order for discharge they must serve it on the manager of the institution where the patient is "detained." There would be no compliance with this direction in the case of a patient who at the date of the service was absent on trial if during such absence he is not "detained." There are other sections to which similar observations apply, notably s. 56, which provides that "where any person is detained as a lunatic" inquiries may be directed as to his property. The regulations dealing with the period of short absences on the authority of the medical superintendent were made under s. 275, sub-s. 5, which comes under part IX. of the Act. Under s. 238 local authorities are directed to provide and maintain asylums "for the accommodation of pauper lunatics." The argument based on the fact that s. 55 falls under part II. of the Act does not in strictness apply to these regulations, but these absences may, I think, be properly regarded in the same light as absences pursuant to s. 55. They are part of the treatment of the patients for whom accommodation is to be provided. It is legitimate to infer that, in using the word "detained" in connexion with the Lunacy Acts and making such "detention" the sole test for determining whether a person has been "under "care and treatment," Parliament must have had in mind the provisions of the Lunacy Act, 1890, which I have examined. It can scarcely have intended that the persons entrusted with the beneficial powers given by that Act with regard to leave of absence should be placed in the position where they will know that, if they exercise them, the husband or wife of the patient for whose benefit the powers are given may find himself or herself deprived—for ever, if the powers are exercised during every period of five years—of any hope of obtaining release from the matrimonial tie. The alternative would be to deprive the patient of a type of care and treatment for which the legislature has provided.

The learned President has taken a different view in three carefully considered judgments, including that in the present case. The first of them is that in *Shipman* v. *Shipman* (1). In that case the absences were, as the learned President held,

(1) [1939] P. 147.

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absences on trial. During the period of five years these absences totalled in all close on a year. He drew a distinction (1) between the case where there is "liability to be "detained, if and when a reception order is called out of "abeyance" and the case of an "actual detention under an "order which is being enforced." If I may respectfully criticize this language, the suggestion that during absence on trial the reception order is in abeyance is really not correct. The reception order is in force throughout. The absence is merely a method of the care and treatment which is given under and by virtue of the reception order and pursuant to the statutory powers given to the persons authorized to receive the patient under the order. In fact, the learned President is, I think, paying too much attention to detention as a physical fact and is not regarding it, as I think it ought to be regarded, as a status. This, in brief, is my broad reason for taking a different view to that of the learned President. The second decision was that in *Green* v. *Green* (2). In that case there had been short periods of absence under the regulations and also a period of absence on trial under s. 55, sub-s. 1. This latter period was spent in a house belonging to the Mental After-Care Association which had been approved by the London County Council for the reception of patients absent on trial. The learned President thought that the association ought to be treated as agents of the council, and that, accordingly, there was no break in the detention. With great respect, I find it difficult to follow this argument. The council and nobody but the council had the right to detain the patient. Neither the right nor the duty to detain the patient could be delegated. The only justification for sending the patient to the house of the association was the grant of leave of absence on trial. The case, therefore, as it seems to me, was indistinguishable from any other case of absence on trial. The short absences in the present case were treated by the learned President as falling under the principle of de minimis. In this he followed a dictum of his own in *Shipman* v. *Shipman* (3). He realized the difficulty of so treating short absences under the regulations if in the aggregate they amounted to a substantial period. I am very doubtful whether the principle of de minimis ought to be applied. If detention means detention in a physical sense it is interrupted

(1) [1939] P. 165.
(2) [1939] P. 309.
(3) [1939] P. 147.

by four days' absence just as much (though not for so long) as by forty. The real reason why these short absences ought not to be regarded as interruptions is, in my opinion, that which I have already given.

In his judgment in the present case the learned President explained his decision in *Green* v. *Green* (1) as being a case where the detention by the association was " a lawful incident "of a reception order," but the leave of absence in that case could only be a lawful incident of the reception order because it was a leave of absence on trial duly granted. If it was to be regarded as a delegation of the right of detention which the London County Council had under the detention order, it could not have been a lawful incident of the reception order since no such right to delegate is to be found in the Act. Neither on the facts nor as a matter of law could the house of the association be regarded as, to use the President's own expression, an " annexe " of the London County Council hospital. The learned President distinguished the present case from *Green* v. *Green* (1) on the facts, the patient here not having been, during the absences on trial, in (as he put it) " what can " fairly be regarded as the equivalent of the institution." As will appear from what I have said, I have come to the conclusion that *Shipman* v. *Shipman* (2) was wrongly decided and that *Green* v. *Green* (1) was rightly decided, but for the wrong reasons. I appreciate the point to which the learned President attached importance, namely, that there is no limit under the Act to the length of time for which leave of absence on trial may be granted. If the conclusion to which I have come is thought to open the door too widely in this respect, it is for the legislature to adjust the opening to the point desired. The present case is one in which the court is asked to exercise its discretion. The learned President felt no difficulty about this, and I agree with his view. In the result, the appeal must be allowed and a decree nisi granted.

MACKINNON L.J. stated the facts and continued: The learned President felt constrained (with avowed regret) to hold that during the two " absences on trial " in 1942 under s. 55 the husband was not within s. 3 of the Act of 1937 " detained " in pursuance of the order of December 7, 1937, and, therefore, could not be " deemed to have been con- " tinuously under care and treatment " within s. 2 of that

(1) [1939] P. 309. (2) [1939] P. 147.

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Act. In this view of the effect of absence under s. 55 he followed his own previous decision in *Shipman* v. *Shipman* (1). In that case he also thought that short absences under s. 275 need not be held to defeat the continuity of "detention" on the principle of de minimis non curat lex. He indicated that, if the husband had only been let out in this case under s. 275, "for short absences overnight in accordance with the "regulations," as he expresses it, he would have applied that principle. It is manifest, however, that, on the review of five years, the total of days of absence under s. 275 might be enormously greater than a single absence under s. 55, or, as in this case, two such absences of a combined total of sixty days. I cannot agree with the decision of the learned President. On the facts it appears from the evidence of Dr. Davies that these two "absences on trial" were granted on condition that the patient was to be in the care of his father, who was to watch his condition, report on it from time to time, and bring him back to the hospital if the patient's condition seemed to require it. The care and custody of the father seems to vary but little in kind from that of the voluntary association whose care and custody of a patient for fourteen days was held by the President in *Green* v. *Green* (2), not to be an interruption of detention in the mental hospital required by s. 3 of the Act of 1937.

Apart, however, from the facts of this case, in my view, neither an absence on trial under s. 55 nor a short absence under s. 275 can cause an interruption of detention so as to defeat the manifest intention of s. 2 of the Act of 1937, provided that they occur while the order or inquisition under one of the Acts specified in s. 3 of the Act is still in force and the patient is liable to be brought back to the hospital directly the permitted absence has ended. It is quite certain, I think, that the legislature never intended by s. 3 to achieve such an absurd result, and I am satisfied that they have not, by the faulty language of s. 3, compelled us so to hold. I do not think the word "detained" is used with exact insistence on its precise meaning. "Detained" and "confined" are used many times in the Lunacy Act, 1890—for example, s. 47: "confined in an institution for lunatics"; s. 49: "detained "as a lunatic in any institution for lunatics"; s. 50: "detained as a lunatic"; s. 51: "confined in any institution "for lunatics"; s. 116, sub-s. 1: (*c*), "lawfully detained as

(1) [1939] P. 147. (2) [1939] P. 309.

"a lunatic"; s. 198: "detained as a lunatic"; s. 206: "detained or treated as a lunatic." In every one of these places I think the person referred to would be "detained" or "confined" as a lunatic even at a time when he or she was in fact "absent on trial" under s. 55. It is, perhaps, to be especially noted that, if it were not so, the administrative powers of a judge under s. 116, sub-s. 1 (*c*), as to a person "lawfully detained as a lunatic" would come to an end directly he was let out for a fortnight under s. 55.

Section 3 of the Act of 1937 refers to six other Acts besides the Lunacy and Mental Treatment Acts, 1890 to 1930. I have referred to only one of them—The Yarmouth Naval Hospital Act, 1931. That is much shorter and less elaborate than the Lunacy Act, 1890. The material provisions are: s. 1: "The "Admiralty may order that a man be removed to and detained "as a patient in the hospital"; s. 3, sub-s. 2: "The Admiralty "may order his discharge"; s. 4, sub-s. 1: "The officer in "charge of the hospital may grant permission to any person "detained thereat to be absent therefrom for such period "as he may think fit but he may at any time require a person "to whom such permission has been granted to return forth-"with to the hospital." This simpler language seems to me to express the real effect of the more elaborate provisions in ss. 55 and 275 of the Lunacy Act, 1890, and a person let out only on such terms seems to me to be clearly "detained." Similarly, if some Act a century ago referred to a person being "detained for five years in a debtor's prison," I apprehend that a man who was living in the Rules of the Fleet and not inside the prison itself would be "detained in a debtor's prison." As to this, see *In the matter of the Fleet Prison* (1). When the husband here was allowed to visit his father under the conditions imposed by Dr. Davies, he was much more "detained" in the East Riding Mental Hospital than a man was "detained" in the Fleet Prison while he lived in the Rules, and the dirty man in the brown coat (No. 20 on the coffee room flight) whose story was told to Mr. Pickwick by Sam Weller in the Fleet was, I think, "detained" in that prison until he died, although after seventeen years strict incarceration (for a debt of nine pounds multiplied by five for costs) he was for a long period let out daily by the turnkeys to spend his time in public houses.

(1) (1824) 2 Bing. 163.

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LUXMOORE L.J. I have read the considered judgments that have just been delivered, and I find myself in complete agreement with the views expressed by my Lords. It is not through any want of respect for the learned President that I have in the circumstances thought it unnecessary to write a judgment reiterating the reasons which have been expressed by my Lords.

Appeal allowed.

Solicitors: *Redpath, Marshall & Holdsworth, for Shackles, Dunkerly & Barton, Hull; Official Solicitor.*

H. C. G.

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June 9.
Scott, Goddard and du Parcq L.JJ.

WINTER *v.* WINTER.

Divorce—Petition—Presentation within three years of marriage—"Exceptional hardship or depravity"—Evidence—Prima facie evidence on affidavits—Discretion of judge—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 1.

Under s. 1 of the Matrimonial Causes Act, 1937, no petition for divorce shall be presented to the High Court within three years of the marriage, but a judge of the High Court may, on application being made to him, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent:—

Held, that the judge, in deciding what constitutes exceptional hardship or exceptional depravity, is entitled to act on prima facie evidence in the affidavits filed on the application, and that if, in the proper exercise of his discretion, he grants leave to present a petition his decision will not be reviewed by the Court of Appeal.

Blunt v. *Blunt* [1943] A. C. 517, applied.

APPEAL from order of Wallington J. at chambers.

The parties were married on August 14, 1942. On January 3, 1944, an application by originating summons was made to the judge by the wife under s. 1 of the Matrimonial Causes Act, 1937 (1), for leave to present a petition for dissolution

(1) Matrimonial Causes Act, 1937, s. 1, sub-s. 1: "No petition for divorce shall be presented to the High Court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the High Court may, upon application being made to him in

of the marriage before the expiration of three years from the date of the marriage. In pursuance of r. 2 (2.) of the Matrimonial Causes Rules, 1937, the wife filed an affidavit in support of her application stating the grounds on which it was made and setting out the facts on which she relied. She annexed to the affidavit the petition she proposed to lodge for a divorce on the ground of cruelty in which were set out in substance the facts stated in her affidavit. There was an affidavit in answer by the husband, and another affidavit by the wife in reply. There were no children of the marriage. The probate registrar reported, pursuant to r. 2 (5.) of the Rules, that there was no reasonable probability of a reconciliation between the parties. Wallington J., at chambers, after hearing counsel on both sides, reading the affidavits, and considering the report of the registrar, made an order that the wife should have leave to present a petition for divorce before the three years from the date of marriage had expired. The husband appealed.

Harold Brown for the husband. The judge did not have before him adequate materials on which he could make the order giving leave for the petition to be presented. [GODDARD L.J. It was never intended that, on the application for leave to present the petition, the judge should try the petition.]

Sellers K.C. and *Horniman*, for the wife, were not called on to argue.

SCOTT L.J. The proviso to s. 1, sub-s. 1, of the Matrimonial Causes Act, 1937, makes it clear that there may be a valid exercise of discretion by the judge on an application for leave to present a petition for divorce before the expiration of three

" accordance with rules of court, " allow a petition to be presented " before three years have passed " on the ground that the case is " one of exceptional hardship " suffered by the petitioner or of " exceptional depravity on the " part of the respondent, but if it " appears to the court at the hear- " ing of the petition, that the " petitioner obtained leave to " present the petition by any mis- " representation or concealment " of the nature of the case, the " court may, if it pronounces a " decree nisi, do so subject to the " condition that no application to " make the decree absolute shall " be made until after the expira- " tion of three years from the date " of the marriage, or may dismiss " the petition, without prejudice " to any petition which may be " brought after the expiration of " the said three years upon the " same, or substantially the same, " facts as those proved in support " of the petition so dismissed."

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years from the date of the marriage although, after evidence has been given in support of the petition at the hearing, it is apparent that the allegations in the petition did not truly constitute a case of exceptional hardship suffered by the petitioner or exceptional depravity on the part of the respondent. That such a position is possible is manifest from the language of the proviso which empowers the court in such an event to order that the decree nisi shall not be made absolute until after the expiration of three years from the date of the marriage or to dismiss the petition without prejudice to another petition being brought on the same or substantially the same facts. The proviso also clearly contemplates that the judge in deciding whether a case is one of exceptional hardship or exceptional depravity, has power to act on the prima facie result of the evidence put before him. That that is a sound view of the meaning of the section as a whole is indicated by two considerations: (1.) that which I have already mentioned, namely, that the section contemplates that a mistaken view may be taken by a judge on the application owing to the misrepresentation or concealment of the nature of the case by the petitioner, and (2.) that the ordinary rules under which a party is at liberty to cross-examine a deponent on any affidavit can be invoked if necessary. In the present case no notice of desire to cross-examine was given. With the safeguards I have mentioned I see no reason why the proviso should not be given its apparent meaning, namely, that the judge should be entitled to act on prima facie evidence in deciding what constitutes exceptional hardship or exceptional depravity. It was suggested in argument that to ascertain the meaning of the words " exceptional hardship " we might substitute some other words for them. But to substitute another word for the statute is useless unless that other word has a different meaning from the word in the statute; and if it has it is wrong to substitute it. The judge in the present case came to the conclusion that there was exceptional hardship or exceptional depravity or both, and he made an order giving the wife leave to present the petition. The matter was one in his discretion exercised on the prima facie evidence contained in the affidavits put before him. Having regard to the rules laid down by the House of Lords in *Blunt* v. *Blunt* (1) in connexion with the exercise of discretion by a judge in the Divorce

(1) [1943] A. C. 517, 526.

Court, I have no doubt that we should be doing wrong if we attempted to review his discretion in the present case, not that I should desire to do so, even if I had the power.

GODDARD L.J. In this case we are being asked to review the discretion of a judge as exercised by him on an application for leave to present a petition for divorce. The jurisdiction is not of an easy character. Under s. 1 of the Matrimonial Causes Act, 1937, one judge might give leave for a petition to be presented before the expiration of three years from the date of the marriage on the ground that the case was one of exceptional hardship, and the judge before whom the petition came on for hearing might think that the case was not one of exceptional hardship. If the latter judge takes that view, he can only postpone the making of the decree absolute or dismiss the petition if it appears that the petitioner obtained leave to present the petition by misrepresentation or concealment. If there has been none and the facts proved at the hearing of the petition are the same as those set out in the affidavit on which the leave was obtained, the judge at the hearing of the petition, however much he may differ from the judge who granted leave for the presentation of the petition before the expiration of three years from the date of the marriage, cannot bring into force the provisions of the proviso to s. 1, sub-s. 1, of the Act.

The proviso allows a petition to be presented before the expiration of three years "on the ground that the case is one "of exceptional hardship." Those words cannot mean that, on an application for leave to present the petition, the judge is to try whether the case is one of exceptional hardship or depravity, because that would involve, certainly in the latter instance, deciding whether or not the allegations in the petition were true. In my opinion, the words mean that the judge has to come to a conclusion that the allegations made in the affidavits filed on the application are such that, if proved, they would amount to exceptional hardship or depravity, though of course he may take into consideration the affidavits, if any, filed in opposition to assist himself in forming a conclusion as to the likelihood of the case proving to be of that character. Is it possible in the present case to say that there were no grounds on which the judge could properly exercise his discretion? To decide that question would involve deciding whether there were exceptional grounds of hardship or depravity. On reading the petitioner's

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affidavit I should have thought that this was the sort of case which one might expect to hear every day in a court of summary jurisdiction or the Divorce Court and that there was nothing exceptional about it, but it is for the judge who hears the application to decide whether the case is one of exceptional hardship, and it seems to me that on such facts as Wallington J. had before him it is impossible to say that there were no grounds on which he could exercise his discretion as he did.

In *Charles Osenton & Co.* v. *Johnston* (1), it was said that: "The appellate tribunal is not at liberty merely to substitute "its own exercise of discretion for the discretion already "exercised by the judge. In other words, appellate authorities "ought not to reverse the order merely because they would "themselves have exercised the original discretion, had it "attached to them, in a different way. But if the appellate "tribunal reaches the clear conclusion that there has been "a wrongful exercise of discretion in that no weight, or no "sufficient weight, has been given to relevant considerations ". . . . then the reversal of the order on appeal may be "justified." This passage was cited with approval by Viscount Simon L.C. in *Blunt* v. *Blunt* (2). As at present advised and on the material before the judge in the present case, I doubt if I should have exercised my discretion in the way in which he did, but I cannot say that there were no grounds on which he could so exercise it.

DU PARCQ L.J. I agree that it is impossible for us to interfere. In *Blunt* v. *Blunt* (2) Viscount Simon L.C. in terms accepted the proposition on which Goddard L.J. based his judgment in that case in the Court of Appeal, and which he formulated as follows: "That this discretion is one with which this court "should be slow to interfere is unquestionable, but if it is "of opinion that the judge has proceeded on wrong grounds "or has not taken into account facts which ought to have "been considered, this court not only can, but ought to, "substitute its view for that of the judge below." There is nothing to shew that in the present case Wallington J. proceeded on wrong grounds. The section of the Act is not easy to apply, but it is not difficult to understand. People may differ as to what amounts to exceptional depravity or even as to what amounts to depravity, and there will always be

(1) [1942] A. C. 130, 138. (2) [1943] A. C. 526, 528.

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border-line cases, but the judge understands the language of the section as well as we do. In the present case no grounds exist for saying that the judge proceeded on a wrong ground or that he took into account facts which should not have been considered. He is given a wide discretion, and we should not seek to fetter it. I agree with Scott L.J. that nothing is to be gained in construing an Act of Parliament by trying to translate the language which the legislature has used into other language.

Appeal dismissed.

Solicitors for husband: *Pennington & Son.*
Solicitors for wife: *Vincent & Vincent, for J. H. Richardson, Leeds.*

R. F. S.

BARKER *v.* BARKER (MIKES cited).

1944
March 21;
April 4.
Hodson J.

Divorce—Settlement of property of guilty wife—Benefit of child—Wife's income under father's will—Creation of discretionary trusts in favour of child—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 191, *sub-s.* 1.

On an application under s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, by the husband for the sub-settlement for the benefit of the infant child of the marriage of certain life interests belonging to the wife who had been found guilty of adultery, it appeared that the husband's income was less than 800*l.* a year and that the wife's income was 1,702*l.* a year, liable to increase on the death or remarriage of her mother. The wife's income was wholly or mainly derived under the will and codicil of her father, by the trusts whereof a share of his residuary estate was settled (subject to a prior interest of the wife's mother during her life or widowhood in a moiety) on trust for the wife for life, subject to a restraint on anticipation effective during coverture, and after her death for her children or remoter issue as she should by deed or will appoint, and, in default of appointment, for all her children who, being male, should attain twenty-one, or, being female, should attain that age or marry, if more than one in equal shares, with the usual hotchpot provision. The wife had power to appoint a life interest to any husband of her's who should survive her. Before the report by the registrar had been submitted the wife delivered unconditionally a deed which she had previously executed as an escrow

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appointing one-half of the corpus of her settled share on trust for the child on his attaining the age of twenty-one absolutely. The registrar submitted that an order should be made directing the wife to settle and assign to trustees her life interest to secure during the residue of her life for the benefit of the child one-quarter of her annual income :—

Held, that the report be varied by ordering the wife to assign to trustees one-quarter of her income arising under her father's will to be applied by the trustees on discretionary trusts for the maintenance, education and benefit of the child until he should attain twenty-one years of age and so that any surplus annual income not so applied should sink back into the income of the wife's settled share in her father's estate.

MOTION.

The wife petitioner not having proceeded with her petition on the ground of the husband's cruelty, a decree nisi was pronounced, on April 2, 1943, in favour of the husband on proof of allegations in his amended answer of adultery by the wife. Custody of the child of the marriage, born on September 15, 1933, was given to the husband. The decree absolute was pronounced on January 25, 1944.

The husband was in receipt of an income of less than £800 a year derived from his professional practice and from investments. The wife's income was principally derived from her share of the income of the estate of her father, Frank Hickman. It had been for the previous two years at the rate of £1,702 a year, and was liable to increase on the death or remarriage of her mother. The wife's father executed his will on January 15, 1914, and a codicil thereto on March 30, 1917, and he died on June 3, 1929, leaving him surviving his widow (the wife's mother) and three children (the wife and her two brothers). Under the will and codicil a share of his residuary estate was settled (subject to a prior interest of the wife's mother during widowhood in a moiety) on trust for the wife for life, subject to a restraint on anticipation effective during coverture, and after her death for her children or remoter issue as she should by deed or will appoint, and, in default of appointment, for all her children who, being male, should attain the age of twenty-one, or, being female, attain that age or marry, if more than one in equal shares, with the usual hotch-pot provision. The wife also had power of appointing a life interest to any husband of hers who should survive her.

On November 8, 1943, the husband filed an application under s. 191, sub-s. 1, of the Supreme Court of Judicature

(Consolidation) Act, 1925 (1), for the settlement of the wife's property for the benefit of the child, claiming that she should assign to trustees her life interest under her father's will to secure during the joint lives of herself and the child for the child's benefit an annuity amounting to one-quarter of her annual income under the will from time to time, and also that, in default of her release of her power of appointment under the will over her share of the residuary trust fund to the extent of one-half thereof further to secure during her life for the child's benefit an additional annuity of one-quarter of her annual income from time to time. Meanwhile, the wife had delivered unconditionally a deed which she had already executed as an escrow appointing half the corpus of her settled share (subject to previous interests therein) to the child at twenty-one. The latter half of the husband's application was not proceeded with, and the registrar submitted that an order should be made in the terms of the husband's application as modified.

Bush James K.C. and *Ifor B. Lloyd* for the husband, supported the registrar's report.

Holroyd Pearce for the wife. The report goes too far. having regard to the wife's exercise of her special power, her offer to contribute a reasonable sum to provide for the child's maintenance and education until his majority is sufficient. This can be secured.

Salt, for the trustees of the wife's father's will. The question is not one of varying the testator's will settlement, but of making provision for the existing child out of the wife's income, having regard to her partial exercise in his favour at twenty-one of the special power, which has not been attacked. The trustees of the will are concerned impartially for all actual and potential beneficiaries in the wife's settled share, including

(1) By s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925: "If it "appears to the court in any case "in which the court pronounces a "decree for divorce or for judicial "separation by reason of the "adultery of the wife that the wife "is entitled to any property either "in possession or reversion, the "court may, if it thinks fit, order "such settlement as it thinks "reasonable to be made of the "property, or any part thereof, "for the benefit of the innocent "party, and of the children of the "marriage or any or either of "them.

"Any instrument made under "any order of the court made "under this section shall be valid "and effectual, notwithstanding "the existence of coverture at the "time of the execution thereof."

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the wife herself, the existing child, that child's future issue and the future children and remoter issue of any subsequent marriage of the wife. The jurisdiction under s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, is to restore, so far as possible, the financial position of those who might be expected to have benefited by the wife's means if the home had not been broken up. The husband having expressly disclaimed any desire to benefit himself, the question is what provision should be made now for the existing child according to his best interests. On attaining twenty-one the child will be able, subject only to the possible continuance of the limited interests of his mother and maternal grandmother, to sell or mortgage his appointed moiety of the corpus of the wife's settled share. If a quarter of the wife's income for the time being is now made over as asked to the child during the wife's life, there will be a merger quoad the quarter of the income and corpus when the child attains twenty-one. This would be unduly to better his position economically, and it might well not be otherwise to his advantage or to the advantage of his potential children that he should have so certain a prospect of unqualified independence in his own right. To avoid the merger, a suitable fraction of the wife's income could be settled on discretionary trusts for the child, but only until he attains twenty-one. Surplus income not applied under the discretion could be made to sink back into the income of the wife's settled share.

Bush James K.C., in reply, referred to *Midwinter* v. *Midwinter* (1).

Cur. adv. vult.

April 4. HODSON J. read a judgment in which he stated the facts and continued : The validity of the exercise by the wife of her power of appointment has not been challenged in these proceedings. She has stated on oath that it has always been her intention to exercise her power over the capital of the fund to the extent of one-half in favour of her son, and I am proceeding on the footing that the validity of the deed of appointment is not likely to be effectively challenged.

It has been argued on behalf of the wife that, in view of the benefit which has been given to the child by the deed of appointment, no such order as is claimed should be made, on the ground that, so far from putting the child in as good a position

(1) [1893] P. 93.

financially as he would be if the home had not been destroyed, it might be harmful to him, and, further, might have the effect of putting him in the position during his mother's lifetime of being very much better off than his mother. It was, further, argued that the husband would obtain benefit from the order sought to be made so long as the child were under his control which would be inconsistent with his professed desire to obtain no benefit for himself. It was also pointed out that the wife's income was liable to fluctuation, and likely to fall in the future. She offered, in the alternative, to undertake to abide by any order that the court might make against her from time to time for the maintenance of the child and argued that the giving of such an undertaking now would destroy, so far as is necessary, the restraint on anticipation which would arise during coverture. She did not, however, offer any security or suggest any means by which she should make it impossible for her to place herself in such a position as to be unable to comply with the order if, for example, she were to assign her interest to some other person. She also contended that, if such an order were made as was sought by the husband, the proportion of the income which should be devoted to the child should be smaller than one-quarter.

The trustees of the will of the wife's father pointed out that, while not in any way opposing any order the court thought fit to make, nevertheless, the effect of the order which the husband desired would be that, on attaining the age of twenty-one, the child would be entitled to call for one-quarter of the corpus of the property in possession by the combined effect of the assignment of that part of his mother's life interest and the deed of appointment. This result would be manifestly contrary to the intentions of the testator, and not necessarily in the best interests of the child. It was, therefore, suggested as an alternative scheme that, to avoid this merger of interests and at the same time to provide for the child during his minority or afterwards, a proportion of the income of the wife should be assigned to trustees during the joint lives of the child and his mother on discretionary trusts for his benefit, maintenance, and education, with a provision that the unexpended balance of the income should sink back into the settlement created by the will.

The husband opposed these counter proposals and adhered to his original application, relying on the fact that there was no precedent for such an order as was proposed by the trustees

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of the will, and, in particular, on the authority of *Midwinter* v. *Midwinter* (1), where an order was made inter alia providing for the assignment of the income of a guilty wife to children for the whole of their lives. It was pointed out in that case that under s. 45 of the Matrimonial Causes Act, 1857, now replaced by s. 191 of the Act of 1925, there is no obstacle to provision being made for a child during the whole of his life. That case, however, does not provide an illustration of the problem which presents itself here, as there was no question of the merger of a life interest and a reversionary interest.

In my judgment, the scheme put forward by the trustees of the will is fair and reasonable, and the amount fixed by the registrar is not open to objection, but the provision for the child should not extend beyond twenty-one. At that age, if his mother is still living, he will, if necessary, be able to raise money by mortgaging his reversionary interest under the deed of appointment. The wife will, therefore, be ordered to assign to trustees one-quarter of her life interest under the will of the wife's father, Frank Hickman, on discretionary trusts for the maintenance, education and benefit of the child of the marriage until he attains the age of twenty-one years, the balance remaining out of the annual income available to the trustees to sink back into the settlement created by the will of Frank Hickman at the end of each year. There will be no limitation of the discretion of the trustees by the order, but there will be liberty to apply in case difficulty arises in the future in the exercise of their discretion by the trustees. There will be no order as to the appointment of trustees of the settlement save liberty to apply in default of agreement. The settlement itself will, in default of agreement, be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties. The report of the registrar as to costs will be confirmed, subject to the addition of a certificate for two counsel.

Solicitors for husband: *Finnis, Downey, Linnell & Price*

Solicitors for the respondent wife: *Gordon Dadds, & Co.*

Solicitors for trustees of wife's father's estate: *Moodie, Randall, Carr & Brown.*

(1) [1893] P. 93.

T. A. H.

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March 17;
May 16, 25.

Hodson J.

IN THE ESTATE OF BEAN.

Probate—Will—Signature—Separate documents—Testator's name written on back of paper and on envelope containing the paper—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict., c.* 26), *s.* 9.—*Wills Act Amendment Act,* 1852 (15 & 16 *Vict., c.* 24), *s.* 1.

By a document, which purported to be his will, the deceased, George Bean, appointed his wife his sole executrix. The deceased used a printed form of will which contained the usual formal parts and was completed in the deceased's handwriting down to and including the attestation clause. The document was not signed by the deceased, the space left in the form for a signature not being filled in, but after the deceased had filled in the form, he wrote his name, "George Bean," and address, and the date (May 23, 1940) on the back of it and also filled in spaces on the envelope on which were printed the words: "The last will and "testament of ..... of ..... To..... "Executor. Date....." by writing his name and address, the name of the executrix, and the date. The attesting witnesses then signed their names and added their addresses in the spaces provided in the document for the purpose. The envelope was lying on the table at the time and the writing on it was seen by one of the attesting witnesses. After attestation the deceased folded the will form and handed it to the executrix, who had been present during the whole transaction, and she kept it in a box until after the death of the deceased on December 29, 1943. She now moved to admit the document and the envelope to probate as together forming the true last will of the deceased:—

Held, that the motion failed on the ground that the name "George Bean" written on the envelope was not the signature to the will.

In the Goods of Mann, [1942], P. 146, distinguished.

MOTION for grant of probate.

The facts appear from the headnote.

Hollins for the executrix.

Geoffrey Cross for the infant child of the deceased.

Cur. adv. vult.

May 25. HODSON J. read a judgment in which, after stating the facts, he said: The question is whether the requirements of s. 9 of the Wills Act, 1837 (1), have been

(1) By Wills Act, 1837, s. 9: "No will shall be valid unless it "shall be in writing and executed "in manner herein-after mentioned; (that is to say,) it shall be "signed at the foot or end thereof "by the testator, or by some other "person in his presence and by his

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satisfied. By the Wills Act, 1852, a very wide construction was put on the words " at the foot of the will " in s. 9 of the Act of 1837. The executrix has put forward the will and the envelope as together forming the true last will of the deceased. It is, therefore, necessary to determine, first, whether the name " George Bean," written on the envelope, is a signature at all. If this question is answered in the affirmative, then it is necessary to determine whether or not it makes any difference that the signature was written on a separate piece of paper.

The executrix has contended that the facts in this case are so near to those which were considered by Langton J. in *In the Goods of Mann* (2) as to be virtually indistinguishable. In that case an unsigned will and an envelope were together admitted to probate. The evidence, as in this case, was given on affidavit, and I have had an opportunity of seeing the original documents and the evidence then under consideration. The will was all written in the handwriting of the deceased and there were no introductory words leading up to the point where a signature was to be placed. At the end of the dispositive part of the will the deceased added the words " in the presence of witnesses " and then the attesting witnesses signed. There was no material difference in the writing on the envelope from that which appears in this case. The attesting witnesses both deposed to the fact that the deceased, having written on the envelope the words " The " last will and testament of Catherine Mann," pointed out to them both that the documents which she had written were her will. Langton J. found that the signature on the envelope was the signature to the will, and then dealt at some length with the second question, namely, whether or not there was any difficulty in admitting both documents to probate as together constituting the last will of the deceased.

On the facts of the case which I have to consider I find it impossible to answer the first question in the affirmative. The executrix has sworn that she did not know that the deceased had not signed the will form, and it appears to me to be plain that this omission on the part of the deceased was purely accidental in that he failed to sign his name in the

" direction ; and such signature " shall be made or acknowledged " by the testator in the presence " of two or more witnesses present " at the same time, and such " witnesses shall attest and shall " subscribe the will in the presence " of the testator, but no form of " attestation shall be necessary."

(2) [1942] P. 146.

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space provided for the purpose. The writing on the envelope was equally clearly, I think, put there for the purpose of identifying the contents of the envelope and not as a signature at all. The deceased never indicated that the testamentary document and the envelope together constituted his will. He had written his name not only on the envelope, but also on the indorsement which appears on the back sheet. It is true that the indorsement was not visible to the attesting witness whereas the writing on the envelope was seen. Nevertheless, in my opinion, it is impossible to be satisfied that the deceased intended to give effect to the will by writing on the envelope since in all probability, he, like the executrix, was under the impression that he had already signed the will on the form itself.

The motion, therefore, fails on the ground that the name "George Bean" on the envelope is not the signature to the will. I should add that, had it been possible here to find as a fact that the name on the envelope was put there as the signature to the will, I should have regarded the facts in this case as indistinguishable from those in *In the Goods of Mann* (1).

Solicitors: *Corbin, Greener & Cook, for Ward & Co., Doncaster.*

(1) [1942] P. 146.

T. A. H.

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July 11

Barnard J.

Divorce—Petition—Supplemental petition—Allegation of desertion which was not complete at time of original petition—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 176 (*b*) (*as replaced by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2).

A wife filed a petition for dissolution of her marriage on the ground of her husband's adultery. At the date of presentation of this petition she was not in a position also to allege desertion by her husband, that state not having continued for the statutory period of three years. Before the cause came on for hearing, the necessary period of three years having expired, the wife filed a supplementary petition whereby she alleged that her husband had deserted her for a period of at least three years immediately preceding the presentation of the supplemental petition. The

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husband by his answer to the petition, denied the alleged adultery, but, by his answer to the supplemental petition, he did not deny the alleged desertion :—

Held, that, the supplemental petition was equivalent to a petition for the purposes of s. 176 of the Judicature Act, 1925 (as replaced by s. 2 of the Matrimonial Causes Act, 1937), which enables a petition for divorce to be presented to the court on the ground that the respondent has deserted the petitioner without cause " for a period of at least three years immediately preceding " the presentation of the petition," and, therefore, that the wife should be granted a decree nisi on the ground of the husband's desertion.

WIFE'S petition and supplemental petition.

The facts are stated in the headnote. The question raised was whether or not the supplemental petition was so much an integral part of the principal petition that it would be a breach of the statute to take into account in computing the period of desertion, the time which had elapsed between the principal and the supplemental petitions.

Petrie for the wife. It was pointed out in *Cohen* v. *Cohen* (1) that a supplemental petition alleging desertion was disallowed merely by reason of a divorce practice note of December, 1937, which laid down that a " ground " for divorce created by the Matrimonial Causes Act, 1937, could not be alleged by supplemental petition where the original petition had been filed before that Act came into force. The present case is different in that the original petition was filed long after the Act of 1937 had come into force. The Supreme Court of Judicature (Consolidation) Act, 1925, spoke only of a petition, but, by s. 180 of that Act, if a respondent by his or her answer claimed relief on the ground of the petitioners adultery, cruelty or desertion, the court could give to the respondent the same relief which he or she would have been entitled to had he or she presented a petition asking for such relief.

Holroyd Pearce, for the husband, said that he agreed with that contention and added : In *Cohen* v. *Cohen* (1) Lord Romer cited (2), without disapproval of the procedure, *Wood* v. *Wood* (3). There a wife petitioner prayed for the dissolution of the marriage on the ground of adultery and desertion. Sir James Hannen P. found that desertion for

(1) [1940] A. C. 631.
(2) Ibid. 643.
(3) (1887) 13 P. D. 22.

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two years had not been shown and adjourned the suit, but after the required period of two years had run he allowed it to be proved on a supplemental petition. None of the Matrimonial Causes Acts speak of " a supplemental petition." The word petition, as used in the Matrimonial Causes Acts, must include a supplemental petition, since otherwise there would be no jurisdiction to grant a decree (as the court frequently does) on a supplemental petition. The decision of the Court of Appeal in *Sandler* v. *Sandler* (1), which must be read in its context, was to the effect that, if a principal petition were tainted with collusion, a supplemental petition in the same cause was also tainted.

BARNARD J. held that the supplemental petition was equivalent to a petition for the purposes of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as replaced by s. 2 of the Matrimonial Causes Act, 1937), and, after hearing the evidence, pronounced a decree nisi in favour of the wife on the ground of the husband's desertion.

Solicitors for the wife : *Howard Smith & Harston.*
Solicitors for the husband : *Lewis & Lewis & Gisborne & Co.*

(1) [1934] P. 149.

T. A. H.

SIM *v.* SIM.

1944
July 4, 28.
Pilcher J.

Divorce—Judicial separation—Jurisdiction—Parties domiciled in Scotland—Petitioner resident in Scotland—Respondent resident in England.

Husband and wife born and domiciled in Scotland were married at Aberdeen in 1917. In February, 1937, the husband left the conjugal home in Edinburgh and went to Newcastle where he had since continuously resided. On December 7, 1942, the wife, who was still resident in Scotland, filed a petition for judicial separation on the ground of her husband's desertion. An issue as to the domicile of the parties came before the court in April, 1944, and it was then decided that on the material dates (namely, February, 1937, and December 7, 1942), the husband was domiciled in Scotland. On a summons by the husband to show cause why the wife's petition should not be dismissed for want of jurisdiction. :—

Held, that the court had jurisdiction to entertain the wife's suit notwithstanding the fact that she was not at the material time resident within the jurisdiction.

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SUMMONS adjourned into court.

The facts are summarized in the headnote and are fully stated in the judgment.

Clifford Mortimer for the wife. The jurisdiction of the court to entertain suits for judicial separation does not depend on the residence of both parties within the jurisdiction at the time of the institution of the suit. In any case, the ecclesiastical courts regarded the residence of a wife who was not judicially separated from her husband as prima facie being the residence of her husband. Both parties, therefore, are in law resident within the jurisdiction. The residence of the party against whom relief was sought was regarded by the ecclesiastical courts as all-important, and here the residence of the wife must be taken to be that of the husband, namely, England. The residence of the party seeking relief never seems to have been regarded as of any great moment. [*Chichester* v. *Donegal* (1); *Williams* v. *Dormer* (2); and *Yelverton* v. *Yelverton* (3) were cited.]

L. F. Sturge for the husband.

Cur. adv. vult.

July 28. PILCHER J. read the following judgment. On December 7, 1942, Mrs. Elizabeth Farquhar Inglis Sim filed a petition against her husband, Mr. Alexander Sim, asking for a judicial separation on the ground of her husband's desertion. On June 1, 1943, an issue was directed to be tried as to the domicile of the parties on the material dates, namely, February, 1937, when the alleged desertion took place, and December 7, 1942, when the suit was instituted. This issue came before me on April 25, 1944' and after hearing evidence I decided that on the material dates the husband was domiciled in Scotland. During the course of the argument Mr. Mortimer, who appeared for the petitioner, indicated that even if the issue of domicile should be decided in favour of the respondent, he proposed to contend that in a suit for judicial separation this court had jurisidiction, provided that the husband, even though domiciled abroad, was resident within the jurisdiction. Accordingly, I adjourned the case in order that the further point which Mr. Mortimer desired to argue might be formulated with more precision. Having heard the evidence on the issue I reserved the further hearing to myself. I heard no more of the

(1) (1822) 1 Add. 5.
(2) (1852) 2 Rob. Ecc. 505.
(3) (1859) 1 Sw. and Tr. 574.

matter until on July 4, 1944, the case again came before me on a summons taken out by the husband. This summons was expressed in very general terms and it called on the wife to show cause why the petition and the suit should not be dismissed for want of jurisdiction and why she should not pay the costs of the issue as to domicile in which she had been unsuccessful. As the point which Mr. Mortimer desired to argue seemed a somewhat novel one and appeared to be of some general importance, I adjourned the summons into court.

The facts of the case, so far as they are material, are as follows: The husband and wife were born and bred in Scotland and were married at Aberdeen on February 10, 1917. There are four children of the marriage whose ages range from twenty-one to twelve. At the time of the marriage the husband's occupation was that of a draper's and house furnisher's assistant, and he carried on this occupation, in Aberdeen and elsewhere in Scotland, until the year 1929. From 1929 to 1933 he was employed in Dublin, where he lived with his wife and children. He thereafter went to Glasgow with his family and after a short period of employment there he was in 1935 engaged by a firm of house furnishers to open a branch in Edinburgh. In 1936, he took a house in Ladysmith Road, Edinburgh, and shortly after this time his wife noticed a change in his manner. The husband and his wife ceased to occupy the same bedroom and it is clear that at about this time they became estranged. In 1937 the husband was offered employment in Newcastle, at an enhanced salary, and accordingly in February of that year he went to Newcastle, leaving his wife and family in Edinburgh. It is from this date that his desertion is alleged by his wife to have commenced. At first the husband lived in lodgings in Newcastle, visiting his family for short periods at holiday times. On August 9, 1937, he wrote his wife a letter making it clear that he would not have her to live with him at Newcastle, and there is very little doubt that from the date of that letter, if not from some earlier date, the husband was in desertion. Since he left his wife, the husband has paid her substantial sums for her own maintenance and for that of the children. In April, 1938, the wife visited her husband at Newcastle. His attitude to her was hostile and he told her that his plans did not include her. He subsequently leased a house at Newcastle and in July, 1942, removed all his furniture from Edinburgh to Newcastle. Having listened to the evidence I was satisfied that the husband had merely removed his

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residence to Newcastle because he was able to obtain more satisfactory employment there than he could obtain in Scotland. All his relations are still in Scotland and I was satisfied that he still regards Scotland as his home. On the evidence I was satisfied that the husband had never abandoned his Scottish domicile of origin or acquired an English domicile of choice. It follows, therefore, that both husband and wife are domiciled in Scotland. The wife has, moreover, at all material times been resident in Scotland, whereas the husband has for the last seven years been resident in England. In spite of their estrangement the wife was at all material times willing to join her husband at Newcastle.

The jurisdiction of this court to entertain suits for judicial separation is stated in the text-books to depend on (*a*) domicile within the jurisdiction, or (*b*) residence of both parties within the jurisdiction at the time of the institution of the suit, or (*c*) the existence of a matrimonial home within the jurisdiction at the time when the events occurred on which the claim for judicial separation is based or at the time when cohabitation ceased: see Dicey's Conflict of Laws, 5th ed., r. 64 (1.), at p. 288. The requirements of (*a*) and (*c*) above referred to are clearly not fulfilled on the present case. It is also clear that at the time of the institution of the present suit while the husband was resident in England the wife was not.

Mr. Mortimer argued, first, that the requirements set out in (*b*), that both parties should at the material time be physically resident within the jurisdiction, was not justified by the authorities, and, secondly, that, if it was correct to say that both parties must be resident within the jurisdiction, the residence of a wife not judicially separated from her husband was in the eyes of the law the residence of her husband, and that, consequently, both husband and wife must in the present case be regarded as resident in Newcastle and thus within the jurisdiction. So far as I am aware this is the first occasion on which this particular point has come up for consideration by this court. I may, therefore, perhaps be forgiven for making a few general observations on the matter. It is well recognized that in suits for judicial separation it is the duty of this court to act and grant relief on principles which conform as closely as possible to the principles acted on by the ecclesiastical courts. In suits for divorce a mensa et thoro instituted in the ecclesiastical courts the residence of the party against whom relief was sought within the geographical area of the particular

ecclesiastical court was a sine qua non to found jurisdiction. Such a party had to be described in the citation as resident within the jurisdiction of the ecclesiastical court in which the suit was instituted. If the party cited was not in fact so resident and took no point on jurisdiction it seems that the suit proceeded. If, however, such a party wished to question the jurisdiction of the court to entertain the suit on the ground of residence an appearance was entered under protest and the matter was gone into and determined. The principal parties to suits in the ecclesiastical courts were usually husbands and wives unseparated by any judicial decree. Mr. Mortimer informed me that he knew of no case in which a wife who had, in fact, taken up a residence separate from that of her husband had encountered any difficulty on the ground of jurisdiction because she was herself normally resident at the time of the institution of her suit outside the jurisdiction of the ecclesiastical court in which she had cited her husband to appear. Such research as I have been able to conduct into the matter appears to support Mr. Mortimer's statement on this point. That no such case can be found is not, perhaps, surprising when it is remembered that the ecclesiastical courts took no account of voluntary separations between husband and wife, even though made under a formal deed. The residence of a wife unseparated from her husband by judicial decree was apparently regarded as the residence of her husband: see Shelford's Marriage Law and Divorce, 1841, p. 488; where the following passage occurs: "It may be questionable whether a citation "of the wife at the domicile of her husband, is not sufficient to "found the jurisdiction of the court even in a suit of nullity of "marriage against the wife, wherever the wife may be actually "resident. A party may have two domiciles, the one actual, "the other legal; and prima facie at least, the husband's "actual is the wife's legal domicile wheresoever the wife may be "personally resident. Upon the principle of the domicile of "the husband being the legal domicile of the wife, it seems that "the citation of the wife at the domicile of the husband is "clearly sufficient to found the jurisdiction of the ecclesiastical "court in a suit for separation a mensa et thoro by reason of "adultery, the wife being fixed with notice of the suit." In that passage it is clear that by "actual domicile" is meant a bona fide established residence and not domicile in the strict legal sense. It would seem, therefore, that the practice of the ecclesiastical courts affords no ground for saying that the

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jurisdiction of this court in suits for judicial separation depends on the physical residence of both parties to the suit within the jurisdiction.

The proposition stated in the text-books that the residence of both parties in this country is necessary to found jurisdiction in this type of suit is, no doubt, derived from certain observations of Gorell Barnes J. in *Armytage* v. *Armytage* (1). In that case, the husband was a domiciled Australian and his wife an Englishwoman who, on marriage had, of course, taken her husband's domicile. The wife petitioned for a judicial separation in this court on the ground of acts of cruelty committed by her husband in Florence. As a result of her husband's alleged cruelty in Florence the wife came to this country, bringing the children of the marriage with her. Her husband, who desired to obtain the custody of the children, followed her to England and instituted proceedings in the Chancery court to have the children made wards of court. His visit to England was quite temporary, and he intended apparently to return to Australia when he had settled his affairs. At the time of the institution of the wife's suit the husband was, however, in England. It was argued for the husband that the court had no jurisdiction to entertain the wife's suit because the parties were domiciled Australians and the alleged acts of cruelty had been committed out of the jurisdiction. Gorell Barnes J., in the course of a long judgment in which he recites the opinions of a number of well-known international jurists, says (2): "I conclude from the writers "to whom I have referred that most of them are disposed to "consider that the courts of the country in which the parties "are living, though not domiciled, ought to have the right in "a matrimonial suit to afford protection to an injured party "from the cruelty of the other party." Later, he says (3): "Though legally domiciled in Australia, as a matter of fact she" (the wife) "has been forced to separate herself from her husband "and establish herself in a home of her own in this country. "She and her husband are both within the jurisdiction." Further, he says (4): ". . . in my opinion, no valid reason "can be urged against the courts of a country, in which a "husband and wife are actually living, pronouncing a decree "which will protect the one against the other so long as they "remain within the jurisdiction." *Armytage* v. *Armytage* (1)

(1) [1898] P. 178.
(2) Ibid. 192.
(3) Ibid. 195.
(4) Ibid. 196.

was approved and followed by the Court of Appeal in *Anghinelli* v. *Anghinelli* (1). In that case both parties, although not domiciled, were, in fact, resident at the actual time within the jurisdiction.

Although these two cases support the proposition, stated in the text-books, that the court has jurisdiction to entertain a suit for judicial separation where both parties are resident in England at the time of the institution of the suit, in both cases the principal point relied on by the respondent was that the court had no jurisdiction owing to the fact that the parties were domiciled abroad. It is true that in *Armytage* v. *Armytage* (2), and also in *von Eckhardstein* v. *von Eckhardstein* (3), the residence of the petitioner wife in this country was stressed to some extent as a reason for assuming jurisdiction. Both these cases were suits for judicial separation grounded on the husband's cruelty, and the fact that the wife petitioner was actually resident within the jurisdiction, and was, therefore, entitled to the protection of the competent court of this country against molestation by her husband, was taken into account as one of the reasons for assuming jurisdiction.

No such consideration arises, of course, on the facts of the present case. It is to be observed, however, that in *Armytage* v. *Armytage* (2) the acts of cruelty were committed abroad, and there does not appear to have been any serious danger that the husband would have repeated them in this country where the wife was residing under the protection of her relatives. In *Chetti* v. *Chetti* (4) the husband left his wife in 1890 and went to India, where he was domiciled. His wife remained resident at all times in England. The husband never thereafter cohabited with his wife, but, apparently, he returned to England temporarily so that he was physically in this country some seventeen years later when served with the wife's petition for judicial separation on the ground of desertion. It was held that desertion commenced to take place from about 1894, and the husband thereafter seems to have remained in India out of the jurisdiction until he visited this country and was served with the petition. The wife was granted her decree although the husband's desertion had commenced and continued out of the jurisdiction. In *Chetti* v. *Chetti* (5), at the conclusion of the judgment, after mentioning *Armytage* v. *Armytage* (2),

(1) [1918] P. 247.
(2) [1898] P. 178.
(3) (1907) 23 T. L. R. 539.
(4) [1909] P. 67.
(5) Ibid. 88.

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Sir Gorell Barnes said : " Both parties to the present suit were " within the jurisdiction at the time of its commencement, and " in my opinion the petitioner is entitled to a decree of judicial " separation . . . . " In *Chetti* v. *Chetti* (1) there was no question of the wife requiring any protection from molestation in this country by the husband, and the materiality, if any, of his physical presence within the jurisdiction at the time of the institution of the suit was not considered.

I am not, therefore, inclined to attach undue importance to the fact that, in suits for judicial separation founded on cruelty, the residence of the petitioner in this country who may require the protection of the courts of this country seems to have been regarded as a material matter when considering the question of jurisdiction.

Mr. Mortimer referred me to certain cases decided in the ecclesiastical courts, namely *Chichester* v. *Donegal* (2), *Williams* v. *Dormer* (3) and *Yelverton* v. *Yelverton* (4). Each of those cases contains passages helpful to his argument, but I do not find it necessary to refer to them in detail, because I am satisfied that Mr. Mortimer's submission is correct, namely, that the ecclesiastical courts regarded an unseparated wife as prima facie physically resident where her husband was resident, and also that, while the residence of the party against whom relief was sought was regarded by the ecclesiastical courts as all-important the actual residence of the party seeking relief never seems to have been regarded as important or inquired into, probably because an unseparated wife was regarded as resident in law where her husband was resident.

In this case the party against whom relief is sought, namely, the husband, is resident in this country. I was satisfied on the evidence called at the hearing of the issue before me that he had deserted his wife without cause in or about the year 1937. I was also satisfied that, but for his refusal to receive his wife in his Newcastle house, she would have come and lived with him at Newcastle, in which case the husband and wife would both have been physically resident within the jurisdiction. I am not satisfied that the ecclesiastical courts attached any importance to the actual residence within the jurisdiction of a wife seeking relief against her husband, and I see no reason why this court, acting on principles which conform to the principles acted on by the ecclesiastical

(1) [1909] P. 67.
(2) 1 Add 5.
(3) 2 Rob. Ecc. 505.
(4) 1 Sw. and Tr. 574.

courts, should attach any importance in a suit for judicial separation to the actual residence of a wife who has herself invoked the process of the court and so submitted to its jurisdiction. I, therefore, hold that the court has jurisdiction to entertain this suit for judicial separation and that the case shall proceed.

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Solicitors for the wife: *Percy Haseldine & Co.*
Solicitors for the husband: *Hyde, Mahon & Pascall, for Wilkinson & Marshall, Newcastle-on-Tyne.*

T. A. H.

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May 8; *July* 5, 26.
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Divorce—Nullity—Jurisdiction—Voidable marriage—Parties alleged to be domiciled abroad but resident in England—Marriage celebrated in England—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 32—*Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 7 (*i.*) (*a*).

In proceedings to nullify a marriage celebrated in England according to English law on the ground that it has never been consummated owing to the wilful refusal of the respondent the residence of both parties in England at the time of the institution of the suit is sufficient to confer on the court jurisdiction to pronounce a decree.

Salvesen (or *von Lorang*) v. *Administrator of Austrian Property* [1927] A. C. 641, explained.

Inverclyde v. *Inverclyde* [1931] P. 29, not followed.

PETITION for nullity of marriage.

The petitioner, Henry Edward Hutter, a private in the army of the United States of America, sought a decree of nullity of marriage on the ground that the ceremony of marriage through which he went with the respondent at Dunmow, Essex, on August 23, 1943, had never been consummated owing to the wilful refusal of the respondent. The petitioner was domiciled in the United States of America and was on military service in this country when the petition was filed. After the ceremony of marriage the respondent continued to live at the home of her parents in England where she was visited by the petitioner.

Sir Donald Somervell A.-G., *Holroyd Pearce* and *Comyn* for the King's Proctor. The court has jurisdiction to entertain

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the suit, although the husband is not domiciled in England. There is no authority for the distinction which Bateson J. drew in *Inverclyde* (otherwise *Tripp*) v. *Inverclyde* (1) between void and voidable marriages for the purpose of jurisdiction, namely, that in proceedings to nullify a voidable marriage the courts of the domicile of the parties had exclusive jurisdiction to pronounce a decree. That distinction was wrong for two reasons. First, s. 22 of the Matrimonial Causes Act, 1857, provided that "In all suits and proceedings, other than pro-"ceedings to dissolve any marriage, the [divorce] court shall "proceed and act and give relief on principles and rules which "in the opinion of the said court shall be as nearly as may be "conformable to the principles and rules on which the "ecclesiastical courts have heretofore acted and given "relief . . . ." That section has been repealed, but its effect has been kept alive by s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. The jurisdiction of an ecclesiastical court to pronounce on the validity of a marriage contracted within the realm depended on the residence of the party cited within the territorial jurisdiction of the court, and that is the rule which has now to be applied in such a case as the present. There was nothing in *Salvesen* (or *von Lorang*) v. *Administrator of Austrian Property* (2) from which the principle can be extracted that the court of the petitioner's domicile has exclusive jurisdiction in these proceedings. All that case decided was that where parties had been married in Paris and lived together in Wiesbaden and the wife's domicile had become German, the German court was competent to deal with the marriage. Secondly, when a voidable marriage is annulled the result and form of the decree are the same as in the case of a marriage void ab initio. The declaration is completely retrospective, namely, that there never has been a marriage, and, if a child is born during the putative marriage, it is illegitimate, except in cases provided for under s. 7 of the Matrimonial Causes Act, 1937. Rogers' Ecclesiastical Law at p. 561 states ". . . . where a case of impotency or frigidity, "not accidental, but natural and incurable was established, "the matrimony was declared never to have been a matri-"mony," and at p. 562, ". . . . upon entering into a contract "of marriage the law implies an undertaking in both of the "parties to it, that they are capable of consummating that

(1) [1931] P. 29. (2) [1927] A. C. 641.

" contract; when it appears that either of the parties is " incapable, it is a legal fraud upon the other, the original " contract is nullified and the marriage voidable." In any event, the respondent is not domiciled in the United States. A wife only takes her husband's domicile because she is married to him, and in a case of this kind the whole question is whether the respondent is married to the petitioner. [*Simonin* v. *Mallac* (1); *Sottomayor* v. *de Barros* (2); *Cooper* v. *Crane* (3); *Linke* v. *Van Aerde* (4); *Turner* v. *Thompson* (5); *Ogden* v. *Ogden* (6); *Mitford* v. *Mitford and von Kuhlmann* (7); *Roach* v. *Garvan* (8); and *Scrimshire* v. *Scrimshire* (9); *Newbould* v. *Attorney-General* (10); *White* (otherwise *Bennett*) v. *White* (11); and *Easterbrook* v. *Easterbrook* (12) were referred to.]

Neligan for the petitioner adopted the argument of the Attorney-General.

Cur. adv. vult.

July 26. PILCHER J. read the following judgment. This case originally came before me on May 8, 1944. Having heard the evidence I was satisfied on the facts that the petitioner had established his case that the marriage had never been consummated owing to the respondent's wilful refusal to consummate it. It was alleged in the petition that both the petitioner and the respondent were domiciled in the United States of America, and the petitioner in the witness box made it clear that his domicile was, in fact, in the United States of America. The only other material fact which it is, perhaps, desirable to mention is that after the marriage the respondent continued to live in the home of her parents at Dunmow, where she was visited by the petitioner. The petitioner and the respondent only slept together for two short periods at the respondent's parents' house between August and December, 1943, after which date the petitioner was satisfied, as was I after hearing his evidence, that the respondent did not permit him to consummate the marriage, and he, accordingly, left her.

The petitioner being admittedly domiciled in the United

(1) (1860) 2 Sw. & Tr. 67.
(2) (1877) 3 P. D. 1.
(3) [1891] P. 369.
(4) (1894) 10 T. L. R. 426.
(5) (1888) 13 P. D. 37.
(6) [1908] P. 46.
(7) [1923] P. 130.
(8) (1748) 1 Ves. Sen. 157.
(9) (1752) 2 Hagg. Con. 395.
(10) [1931] P. 75.
(11) [1937] P. 111.
(12) [1944] P. 10.

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States of America, I raised the question whether the court had jurisdiction to pronounce a decree of nullity on the ground of the wilful refusal of the wife to consummate the marriage. Mr. Neligan, who appeared for the petitioner, relied on the recent case of *Easterbrook* v. *Easterbrook* (1), in which Hodson J. granted to a Canadian soldier admittedly domiciled in Canada a decree of nullity on the ground that his wife had wilfully refused to consummate the marriage. In that case Hodson J. refused to follow the decision of Bateson J. in *Inverclyde* (otherwise *Tripp*) v. *Inverclyde* (2). In *Inverclyde* v. *Inverclyde* (2) Bateson J., after hearing arguments on both sides, delivered a considered judgment in which he refused to grant to a wife domiciled in Scotland a decree of nullity against her husband, also domiciled in Scotland, on the ground of the husband's incapacity to consummate the marriage. Bateson J. in that case drew a distinction for purposes of jurisdiction between marriages which were void ab initio on the ground of illegality, lack of formality, etc., and marriages which were merely voidable at the instance of one of the parties to the marriage. He held, in effect, that a nullity suit founded on impotence was akin to a suit for dissolution, and, relying on certain observations made by Lord Phillimore in *Salvesen* (or *von Lorang*) v. *Administrator of Austrian Property* (3), he arrived at the conclusion that in proceedings for nullity based on impotence the court of the domicile of the parties had exclusive jurisdiction to pronounce a decree. He, therefore, dismissed the petition.

The facts in the present case seemed to me to be indistinguishable in point of principle from those in *Easterbrook* v. *Easterbrook* (1) and in *Inverclyde* v. *Inverclyde* (2), and, the question of the jurisdiction of this court in nullity cases being one of considerable importance on which two experienced judges had expressed contrary views, I adjourned the present case that I might take an opportunity of looking at the relevant authorities. Having done so, it seemed to me undesirable that I should arrive at a decision without having the matter fully argued, and I, accordingly, caused the papers to be forwarded to the King's Proctor under the provisions of s. 181 of the Judicature (Consolidation) Act, 1925, so that the King's Proctor might instruct counsel to appear and argue the matter fully before me. The case was restored to the list on July 5, 1944,

(1) Ante 10.
(2) [1931] P. 29.
(3) [1927] A. C. 641.

and on that date I had the advantage of listening to a full analysis of all the relevant authorities by the Attorney-General.

The jurisdiction originally exercised by the ecclesiastical courts in matrimonial suits, including suits for nullity, was, by s. 6 of the Matrimonial Causes Act, 1857, transferred to the Court for Divorce and Matrimonial Causes. Section 22 of the Matrimonial Causes Act, 1857, provides: "In all suits and "proceedings, other than proceedings to dissolve any marriage, "the said court shall proceed and act and give relief on "principles and rules which in the opinion of the said court "shall be as nearly as may be conformable to the principles and "rules on which the ecclesiastical courts have heretofore acted "and given relief . . . ." That section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. The section is not in terms re-enacted, but s. 32 of the Act of 1925 provides that: ". . . . where no special provision "is contained in this Act or in rules of court with reference "thereto, any such jurisdiction shall be exercised as nearly "as may be in the same manner as that in which it might "have been exercised by the court to which it formerly "appertained." In substance, therefore, it is still the duty of this court in all matrimonial suits, including suits for nullity but excluding suits for dissolution, to proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts. A marriage which is not consummated on the ground of wilful refusal is clearly voidable in the same sense as a marriage which is not consummated by reason of the impotence of one of the parties to it. The facts in this case, therefore, raise the question whether the distinction drawn by Bateson J. in *Inverclyde* v. *Inverclyde* (1) between marriages which are void and marriages which are voidable is sound.

It is quite clear that the jurisdiction of each particular ecclesiastical court to entertain any suit depended, in the first place, on the residence of the party against whom relief was sought within the territorial jurisdiction of the particular ecclesiastical court before which he was cited to appear. Any doubt which may have existed on this point was set at rest as early as the reign of Henry VIII., when, by the Statute of Citations (2), it was provided: ". . . . No manner" "(of) "person shall be from henceforth cited or summoned . . . . "to appear . . . . before any . . . . judge spiritual, out of the

(1) [1931] P. 39.

(2) (1531) 23 Hen. 8, c. 9.

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"diocese, or peculiar jurisdiction where the person . . . . "shall be inhabiting and dwelling, at the time of awarding, or "going forth of the same citation or summons." The rigidity of this rule was in practice relaxed by a procedure under which letters of request were passed between dioceses, but the residence of the party against whom relief was sought within the jurisdiction of the particular ecclesiastical court was always the governing test. It is also clear that, provided the party against whom relief was sought was resident within the appropriate ecclesiastical jurisdiction, the ecclesiastical courts pronounced on the validity of all marriages contracted within the realm, whether between British subjects or aliens, and granted such relief as was within their competence in respect of such marriages. They also adjudicated on marriages contracted abroad, provided that the party against whom relief was sought was resident within the jurisdiction. Provided the residential qualification was fulfilled, the ecclesiastical courts did not concern themselves with the domicile of the parties, using this word in its technical sense. In stating what I have, I wish to make it clear that I am not attempting to set out the full limits of the jurisdiction exercised by the ecclesiastical courts, but am merely stressing such points as seem to me to be important for the consideration of the matter now before me.

Section 42 of the Matrimonial Causes Act, 1857, which is still unrepealed, provides that petitions in matrimonial causes ". . . . shall be served on the party to be affected thereby, "either within or without Her Majesty's dominions, in such "manner as the court shall . . . . direct . . . ." In order, therefore, that this court shall have jurisdiction, the place where the party against whom relief is sought happens to be at the time of the service of the petition is no longer important, but the fact that the jurisdiction of the ecclesiastical courts to entertain any particular suit depended on the place of residence of such party should not be lost sight of.

The issue in the present suit for nullity being whether the admitted fact that both parties were at all material times resident in England is sufficient to confer jurisdiction on this court or whether the admitted foreign domicile of the petitioner is sufficient to oust the jurisdiction, it will be convenient to consider shortly the manner in which this court has interpreted the rules of the ecclesiastical courts, in so far as jurisdiction is concerned, in the two most important types of matrimonial causes formerly dealt with by the ecclesiastical courts. Inas-

much as the residence of the party to be cited within the appropriate jurisdiction was a sine qua non to found jurisdiction in any particular ecclesiastical court, it is not, perhaps, surprising that, in dealing with the two principal forms of matrimonial relief formerly granted by the ecclesiastical courts, this court has held that the residence of the parties in England was sufficient to found jurisdiction. Thus, in suits for judicial separation, corresponding to the divorce a mensa et thoro granted by the ecclesiastical courts, this court has assumed jurisdiction where both parties, irrespective of their domicile or nationality, were resident in England at the time of the institution of the suit: *Armytage* v. *Armytage* (1); *Anghinelli* v. *Anghinelli* (2). In suits for restitution of conjugal rights the residence of both parties within the jurisdiction at the time of the institution of the suit is also sufficient to confer jurisdiction on this court: *Perrin* v. *Perrin* (3). In so far as suits for nullity were concerned, the ecclesiastical courts annulled marriages which were voidable on the ground of impotence as well as marriages which were void on the ground of bigamy, irregularity, etc., and it is quite clear that in matters of jurisdiction no distinction was drawn between those two classes of case. In nullity suits, whether the marriage was void or voidable, it was declared esse et fuisse nullum. The ecclesiastical courts having no power to dissolve a marriage, this was the only possible form of declaration. In successful nullity suits founded on the impotence of the party cited the ecclesiastical courts pronounced that the marriage, although unexceptionable in form, was and always had been a mere nullity. Since the Matrimonial Causes Act, 1857, this form of decree in nullity suits has been preserved, and in all such suits, whether the marriage annulled was void or voidable, it is pronounced in the formal decree "to have been and to be absolutely null and "void to all intents and purposes whatsoever." The point which I have to consider in this case is whether there is any real justification for the distinction drawn for purposes of jurisdiction by Bateson J. between void and voidable marriages. Bearing in mind that it is the duty of the court to follow as nearly as possible the principles and rules acted on by the ecclesiastical courts, it seems to me that the fact that the form of declaration in use for all nullity suits in the days of the

(1) [1898] P. 178.
(2) [1918] P. 247.
(3) [1914] P. 135.

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ecclesiastical courts has been followed by this court for more than eighty years is of some importance.

While the residence of both parties within the jurisdiction has, as I have pointed out, been regarded by this court as sufficient to confer jurisdiction in suits for judicial separation and restitution of conjugal rights, the position with regard to nullity suits has never been quite so clearly stated. I take it, however, to be settled law that, in suits for nullity based on consanguinity, bigamy, irregularity, etc., where the marriage is void ab initio, this court has jurisdiction to pronounce on the validity of any marriage celebrated in England even though the parties are domiciled abroad. *Simonin* v. *Mallac* (1), decided in 1860, shows that shortly after the passing of the Matrimonial Causes Act, 1857, the court was prepared to adjudicate on the validity of a marriage contracted in England between a domiciled Frenchman and Frenchwoman. In that case the marriage had never been consummated and was annulled by a competent French court on the ground of lack of parental consent, lack of publicity and because the parties had deliberately come to this country to evade the provisions of the French law. The wife, who had come to live in this country, sought a decree of nullity here. The marriage, which she had contracted in this country was perfectly good under English law, and the court entertained the suit, but dismissed the wife's petition. I refer to this case only because it decided, among other things, that the wife, having entered into a contract of marriage in this country, was subject to the jurisdiction of the competent court in this country in respect of her personal status resulting from the marriage so contracted. It is, moreover, to be observed that under French law the marriage in this case appears to have been merely voidable and not void. So far as I am aware, the proposition that this court has jurisdiction to inquire into and pronounce on the validity of every marriage contracted in accordance with English law in this country has never been questioned. In *Roberts* v. *Brennan* (2), Sir Francis Jeune in an undefended case held in terms that matrimonial residence was sufficient to give the court power to declare a bigamous marriage null and void even though the domicile of the respondent was Irish and the de facto marriage was celebrated in the Isle of Man. In the course of a very short judgment in that case (3) Sir Francis Jeune said: "In my

(1) 2 Sw. & Tr. 67.
(2) [1902] P. 143.
(3) [1902] P. 143, 144.

'view, residence—not domicile—is the test of jurisdiction in a "nullity case. The jurisdiction of the ecclesiastical courts "was based on the residence of the parties, and in suits for "nullity this court follows the practice of the ecclesiastical "courts, as prescribed by s. 22 of the Matrimonial Causes "Act, 1857." It is interesting, moreover, to observe that as recently as 1939 Henn Collins J., on facts somewhat similar to those in *Simonin* v. *Mallac* (1), granted a decree of nullity to a domiciled Frenchman whose marriage, contracted in England according to the forms prescribed by English law, had been annulled in the French courts on the ground of lack of parental consent, *Galene* v. *Galene* (otherwise *Galice*) (2). In this case also it seems that the marriage under French law was probably voidable and not void. The case was an undefended one. Henn Collins J. does not seem to have been referred to *Simonin* v. *Mallac* (1) and he granted the petitioner the decree which was refused in *Simonin* v. *Mallac* (1) on somewhat similar facts. I only refer to the case because it was a nullity suit between foreigners domiciled abroad in which the court exercised jurisdiction.

It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court to pronounce on the validity of a marriage celebrated in England. If this were not so, it would mean that the competent court for matrimonial suits in this country renounced jurisdiction in matters which were within its own peculiar competence, namely, questions relating to the validity of a marriage contracted in England by persons who, if English, are subject as such to the laws of this country, and, if foreigners, must be taken to have subjected themselves to such laws: *Scrimshire* v. *Scrimshire* (3). The marriage with which I am here concerned was celebrated in this country between a domiciled American subject temporarily resident in this country and an Englishwoman domiciled and resident in this country at the time of the marriage ceremony. If the marriage was in fact a nullity, the putative wife, who apparently never left her parents' home at Dunmow, probably never in law acquired the domicile of her husband. In this connexion I refer to the recent decision of Bucknill J. in *White* (otherwise *Bennett*) v. *White* (4). A finding

(1) 2 Sw. & Tr. 67.
(2) [1939] P. 237.
(3) 2 Hagg Con. 395.
(4) [1937] P. 111.

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on this point is not necessary for the determination of the present case, and I only mention this matter to make it clear that the party against whom relief is sought in this case, namely, the wife, has always been resident in this country and has probably in law never lost her English domicile of origin. In my view, the fact that she has not entered an appearance in the suit does not affect the matter.

In *Inverclyde* v. *Inverclyde* (1) Bateson J. says: "The "marriage being voidable and not void and the decree affecting "and involving an alteration of status and being a judgment "in rem binding on all the world, there can be no jurisdiction "in this court unless the parties are domiciled in this country. "It seems to me that if the principle is sound that in a suit for "dissolution of marriage in divorce jurisdiction depends on "domicile it must equally so depend in a suit for dissolution of "marriage on the ground of impotence. To call it a suit for "nullity does not alter its essential and real character of a suit "for dissolution." I confess that I find some difficulty in following the conclusion at which the learned judge arrives in the last sentence of the passage which I have quoted. It is quite clear that the ecclesiastical courts, in dealing with matrimonial matters which were within their competence, were not concerned with the domicile of the parties to the suit—using the word "domicile" in the strict sense. The bona fide residence of the party cited within the appropriate jurisdiction was all that was required, and no inquiry whether that party had established his permanent home within the jurisdiction was ever necessary. The Matrimonial Causes Act, 1857, conferred on the newly-created civil court the right to dissolve an existing marriage, and s. 22 of the Act, which required this court to act on principles and rules which conformed to the principles and rules acted on by the ecclesiastical courts, applied to all suits and proceedings "other than proceedings to dissolve any marriage." It was only by a slow development, extending over some forty years after the passing of the Matrimonial Causes Act, 1857, that it was finally established that domicile was necessary to found jurisdiction in dissolution cases. In *Brodie* v. *Brodie* (2), bona fide residence in this country was held sufficient to found jurisdiction in a suit for dissolution. In *Wilson* v. *Wilson* (3), Lord Penzance expressly refrained from deciding whether residence in this country which fell short of domicile was

(1) [1931] P. 29, 41.
(2) (1861) 2 Sw. & Tr. 259.
(3) (1872) L. R. 2 P. & M. 435.

sufficient to found jurisdiction in a dissolution suit. In *Niboyet* v. *Niboyet* (1), the Court of Appeal, by a majority, decided that mere residence was sufficient to confer jurisdiction, and it was not until 1895 that it was finally established in *Le Mesurier* v. *Le Mesurier* (2), that domicile in the strict sense must be established in order to found jurisdiction in a suit for dissolution.

It is to be observed that, in considering the matters requisite to found jurisdiction in a suit for dissolution, the civil courts of this country were dealing with a new type of suit and were not fettered by the terms of s. 22 of the Matrimonial Causes Act, 1857, which did not apply to suits for dissolution. In regard to all other matrimonial suits, however, including suits for nullity, this court is still required to act on principles and rules which shall conform to those acted on by the ecclesiastical courts. It seems to me, therefore, that the establishment of the "principle" that in suits for dissolution jurisdiction depends on domicile affords little, if any, ground for saying that jurisdiction in suits for nullity, whether the marriage which it is sought to annul be void or voidable, should be governed by the same test. As I have pointed out, it is now established by a long line of authorities that in nullity suits, when the marriage is void ab initio, residence is sufficient to confer jurisdiction, and it may well be that Bateson J. would not have drawn the distinction which he did for the purposes of jurisdiction between marriages void ab initio and marriages which are merely voidable, had it not been for certain passages in the speeches of the noble lords in *Salvesen* v. *Administrator of Austrian Property* (3), to which I will now refer.

The short facts in *Salvesen* v. *Administrator of Austrian Property* (3) case were as follows. A domiciled Scotswoman married a domiciled Austrian in Paris in 1897. They lived together in Wiesbaden until 1914. During the last war the husband fought in the Austrian Army, and his wife lived in Switzerland until 1923. The Administrator of Austrian Property claimed the wife's movables in Scotland as being the property of an Austrian subject. The wife instituted a suit for nullity in the Wiesbaden court, which was admittedly the court of domicile, on the ground of lack of formality in the Paris marriage. The Wiesbaden court declared the marriage null. On appeal from the First Division of the Court of Session the

(1) (1878) 4 P. D. 1.
(2) [1895] A. C. 517.
(3) [1927] A. C. 641.

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House of Lords rejected the plea of the Administrator of Austrian Property and held in substance that the decree of the Wiesbaden court, which was admittedly a court competent to pronounce on the validity of the marriage, was binding on the courts of this country and of Scotland. Their Lordships were also of opinion that the decree of the Wiesbaden court, being one which affected the status of the parties, was equivalent to a judgment in rem. In the course of his speech Viscount Haldane said (1): "The real question is simply whether the court of the "domicile was competent to dispose conclusively and finally of "the question before it. If so it does not matter in law whether "it had an exclusive jurisdiction"; and later (2) he says: "Whether there cannot be jurisdiction which is not that of the "domicile in restricted instances to entertain a suit for nullity "is a question we have not before us for determination. For, "as I have pointed out, the only relevant issue is whether the "German court was competent as against all other courts "conclusively to declare the marriage in the present case "void." Lord Phillimore, after dealing with and analysing the decisions in *Scrimshire* v. *Scrimshire* (3), *Sinclair* v. *Sinclair* (4), and *Ogden* v. *Ogden* (5), and pointing out that in *Ogden* v. *Ogden* (5) the problem with which the English court was confronted was almost insoluble, concludes his speech as follows (6): "Finally, my Lords, if the "court is a competent court, still more if it is the "only competent court—and in my opinion the Wies- "baden court was the only competent court for these parties "—its judgment must, for the very reason of the thing, be such "a judgment as that described in *A.* v. *B.* (7), 'a definitive "'decree declaring a marriage void, which should be "'universally binding and which should ascertain and deter- "'mine the status of the parties once for all'." Lord Dunedin and Lord Warrington concurred in Lord Phillimore's speech.

Bateson J. states that the decision of the House of Lords in *Salvesen* v. *Administrator of Austrian Property* (8), in his view, is conclusive in favour of the argument for the husband in *Inverclyde* v. *Inverclyde* (9). In his judgment he says that the passage from Lord Phillimore's speech which I have quoted "covers this case precisely" (10). There seems little doubt

(1) [1927] A. C. 641, 652.
(2) Ibid. 654.
(3) 2 Hagg. Con. 395.
(4) (1798) 1 Hagg. Con. 294.
(5) [1908] P. 46.
(6) [1927] A. C. 641, 671.
(7) (1868) L. R. 1, P & M. 559.
(8) [1927] A.C. 641.
(9) [1931] P. 29.
(10) [1931] P. 29, 44.

that in the passage referred to Lord Phillimore was expressing the view that on the facts of *Salvesen* v. *Administrator of Austrian Property* (1) the court of domicile was the only court which was competent to pronounce upon the validity of that particular marriage. It is, however, to be borne in mind that this expression of view was not necessary to the decision of the case. It is moreover to be observed that in *Salvesen* v. *Administrator of Austrian Property* (1), husband and wife had lived for very many years at Wiesbaden. Although the marriage was ultimately pronounced a nullity, the wife had almost certainly acquired a de facto personal domicile in Wiesbaden quite apart from any legal domicile derived from her husband. The usual residence of both parties was, apparently, also in Wiesbaden, and it is, perhaps, sufficient for me to say that the facts of the case which I am considering are very different from the facts in *Salvesen* v. *Administrator of Austrian Property* (1). Any expression of opinion by Lord Phillimore, particularly on a matter of this kind, must, of course, carry great weight, even though the opinion expressed may not have been necessary for the decision of the case under consideration. I am not satisfied that, in using the words which he did, Lord Phillimore intended to lay down any general proposition which would have the effect of ousting the jurisdiction of the courts of this country to entertain a nullity suit where the parties, although resident, were not domiciled within the jurisdiction, more particularly where the marriage which it was sought to annul had been celebrated in England in the manner prescribed by English law. Any such proposition would be manifestly too wide, and, if accurate, would mean that a whole line of cases, whose authority has not been questioned, are wrongly decided. I need only refer to *Simonin* v. *Mallac* (2), *Mitford* v. *Mitford* (3), *Hussein* (otherwise *Blitz*) v. *Hussein* (4), and *Galene* v. *Galene* (otherwise *Galice*) (5).

A declaration by a competent court that a marriage, whether void or voidable, is, in fact, a nullity is, of course, a declaration which affects status, and, as such, is a declaration which is peculiarly within the competence of the court of domicile. A decree of nullity of marriage being declaratory of the status of the parties to the marriage contract, it is, no doubt, desirable on grounds of public policy that such a decree should be

(1) [1927] A. C. 641.
(2) 2 Sw. & Tr. 67.
(3) [1923] P. 130.
(4) [1938] P. 159.
(5) [1939] P. 237.

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pronounced by the competent court of the domicile of the parties. The considerations which have led the courts of this and other countries to found jurisdiction exclusively on domicile in suits for dissolution do not appear to me to apply with equal force to suits for nullity, and it is now well established that proof of domicile within the jurisdiction is not necessary in nullity suits which are void ab initio. Bateson J.'s decision in *Inverclyde* v. *Inverclyde* (1) was really based on the distinction which he drew for purposes of jurisdiction between void and voidable marriages. Although the learned judge seems to have considered that Lord Phillimore's observations in the *Salvesen* case (2) were conclusive of the case before him, it is to be observed that there was nothing in the decision of the *Salvesen* case (2) or in any of their Lordships' observations, which afforded any ground for drawing the distinction which was drawn by Bateson J.—a distinction which, as I have pointed out, formed the real basis for the conclusion at which he arrived.

In my humble opinion, there is no justification, either on principle or on authority, for the drawing of such a distinction. Inasmuch as practical questions of status are involved in the declaration of any court which pronounces on the validity of a marriage, the court of the domicile of the parties has, no doubt, a peculiar competence to adjudicate in such suits. The authorities to which I have referred make it clear, however, that the courts of this country have not regarded the court of domicile of the parties as having exclusive competence to pronounce on the validity of a marriage more particularly where such marriage has, as in this case now before me, been celebrated in this country. I, accordingly, hold that this court has jurisdiction to entertain the present suit and pronounce a decree nisi of nullity.

Solicitors : *E. J. Weston-Davies ; King's Proctor.*

(1) (1931) P. 29. (2) (1927) A. C. 641.

T. A. H.

IN THE ESTATE OF MARDON, DECD.

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June 30;
July 11, 28.
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Probate—Will—Revival—Revival of part of a will—Two clauses in will not revived—Revival by codicil—Probate of partly revived will, codicil with schedule incorporated, and later will—Wills Act, 1837 (7 *Will.*, 4 & 1 *Vict.*, *c.* 26), *s.* 22.

A revoked will may be revived in part or parts by a codicil which shows an intention to revive such part or parts and contains no clause confirming the will in all respects.

An unattested written paper whether or not of a testamentary form or character which is referred to in a duly executed will or codicil and is a document actually in existence at the time of such execution and can be identified becomes part of the will or codicil by its incorporation therein.

MOTION.

The testatrix, Sarah Tutton Cheriton Mardon, who died on November 13, 1943, had executed three wills all of which were prepared for her by Mr. Linnell, her solicitor, and disposed of her whole estate. The first will was dated April 18, 1934. By it the testatrix appointed Agnes Mowbray and Vernon Haddon her executors. Clause 4 of the will provided for the disposal of the residuary estate of the testatrix, and by cl. 7 the testatrix revoked all wills that she had previously made. By her second will, dated August 29, 1935, one Cox and Vernon Haddon were appointed executors. By her third will, dated August 19, 1939, the testatrix appointed Cox and Edith Bellamy her executors. Each of the last-named wills also contained a revocation clause, and as and when they were executed they were retained by Mr. Linnell in his custody on behalf of the testatrix. As and when a will was executed the testatrix was in the habit of making an epitome or abstract of it which she retained for her own use, but the only abstract forthcoming at her death was one of her first will, dated April 18, 1934. In September, 1940, the testatrix handed to Mr. Cox the abstract of her first will and told him that she wanted him to draw a codicil to her will. She went through the abstract of the first will and gave him instructions for the preparation of the codicil, and, in particular, with regard to the portions of the abstract which she desired to be altered. She also handed to Mr. Cox a schedule, and asked him to make a fair copy of it so that it might be attached to the codicil. Mr. Cox drafted a codicil and made a fair copy of the schedule, and the codicil was executed on or about April 22, 1941. The codicil did not contain any clause confirming the

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first will in all respects, or words to that effect. By the present motion Mr. Cox, as one of the executors named in the third will, asked for probate of the first will, the third will, the codicil, and the schedule as together constituting the last will of the testatrix.

Clifford Mortimer for the executor. Though there are no words in the codicil confirmatory of the first will, the codicil deals with matters in that will. I have no knowledge of any reported case in which only part of a will has been held to be revived, but there is no reason in principle against such a revival. The matter is governed by s. 22 of Wills Act, 1837.

William Latey for a party interested. The third will, and the codicil to the first will, only should be admitted to probate. There is intrinsic evidence from the dispositions in the codicil that, although the codicil expressly refers to the first will, the testatrix was thinking of the will of 1939. The dispositions in the codicil are consistent with those of that will. There is nothing in the codicil which can be said to revive the first will or any part of it. [*Goldie* v. *Adam* (1) was referred to.]

Cur. adv. vult.

July 28. BARNARD J. The question I have to decide is what documents together constitute the last will of the testatrix, and, as such, should be admitted to probate. There arises out of that general question the further question whether the first will in whole or in part has been revived by the codicil of April 22, 1941, which purports to be a codicil to that will, and refers to that will by date. The question for decision really depends on the interpretation of s. 22 of the Wills Act, 1837, the material part of which is as follows: "No will or codicil, or any part thereof, which shall be in any "manner revoked shall be revived otherwise than by the "re-execution thereof, or by a codicil executed in manner "hereinbefore required and showing an intention to revive the "same."

It is obvious that when the testatrix asked Mr. Cox to prepare this codicil she had completely forgotten the existence of the two later wills. The whole transaction was a blunder. It is clear from the authorities that it is not necessary that a codicil should show on the face of it that the deceased knew that the

(1) [1938] P. 85.

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will to which the codicil purports to be a codicil had been revoked, and that she was, in fact, reviving that will. This codicil shows an intention to revive a part of the revoked will because it refers to certain provisions of that will as of an existing and a valid will. I am fortified by the view I take of the law by what Sir James Hannen P. said in his judgment in *In the Goods of Dyke* (1): "Where a simple mistake "has been made as to the date of an instrument, the "mistake can be set right: but in a case like this where "the mind of the draftsman, whether the testator himself, or "someone employed by him, has been really applied to the "words of a particular instrument, it is impossible for me to "say that it was by mistake that that instrument was referred "to instead of another. It is plain that that was the actual "instrument which the then draftsman had in his mind, and it "is not possible to avoid the conclusion that the codicil which "purports to be a codicil to the will of October 29, 1878" [that was the first and the revoked will] "and which, after "making certain alterations, confirms that will in all respects "does revive that will."

Mr. Latey has asked me to admit to probate only the codicil and the will of 1939, on the ground that the reference in the codicil to the first will was a mistake. He referred me to *Goldie* v. *Adam* (2). The facts in that case were the exact opposite of the facts in the present case, for in *Goldie* v. *Adam* (2) there was no evidence that the draftsman applied his mind to the provisions of the will to which the codicil purported to be a codicil. The mind of the draftsman must be treated as the mind of the testator. The evidence in the present case, which is clear and undisputed, is that the draftsman applied his mind to certain provisions of the first will, and therefore, at any rate in part, revived that will. On the evidence of Mr. Cox and on comparing the first will with the codicil, it seems clear that the draftsman of the codicil did not apply his mind to either the residuary bequest which is contained in cl. 4 of the first will, or to the revocation clause which is contained in cl. 7, and, as there is no clause in the codicil confirming the first will and there does not appear on the face of the codicil any words showing an intention to revive either of those clauses, neither of those clauses, in my opinion, can be admitted to probate. I do find, however, that the codicil has revived the first will with the exception of cls. 4 and 7. Reading together

(1) (1881) 6 P. D. 205, 208. (2) [1938] P. 85.

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the codicil and the provisions of the first will which are revived, there is no revocation clause and no bequest of residue, and, therefore, I think that there can be no question that the last will, which was never revoked, must also be admitted to probate.

One further question is whether the schedule referred to in the codicil is to be treated as an incorporated document. It is important to look at the wording of the codicil, which reads as follows: "The furniture and belongings with the exception of "the articles mentioned in the schedule attached hereto to be "sold by my executors." It is not clear from those words that the testatrix is in any way seeking to dispose of the excepted articles by the schedule, but I have come to the conclusion that it would be taking too narrow a view of the law to shut this document out from probate, and although Mr. Mortimer in his book on Probate does not give any special authority, I am inclined to rely on the following passage which I have found at p. 181 of the second edition of his work: "The principle "of incorporation by reference may be stated thus:—Where a "testator in a duly executed will or codicil refers to an un-"attested written paper (whether of a testamentary form or "character or not), as a written paper then in existence in such "terms that it may be ascertained, the paper so referred to "becomes part of his will, in other words, is incorporated "therein; provided always that the paper referred to is "actually in existence at the time of the execution of the will "or codicil." The evidence is clear that this schedule was in existence at the time the codicil was executed. It is clearly identified by the codicil, and, therefore, it must be admitted to probate including the pencil alterations, but omitting the alterations in ink as there is no evidence when the latter were made.

[*His Lordship directed that probate should issue of the first will with the omission of cls.* 4 *and* 7, *and of the third will in toto, together with the codicil and the schedule, including the pencil but omitting the ink alterations.*]

Solicitors for the executor: *Clifford-Turner & Co., for Linnell & Murphy, Oxford.*

Solicitors for party interested: *Nicholl, Manisty, Few & Co.*

T. A. H.

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